LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 28 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 757

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Petitioner,

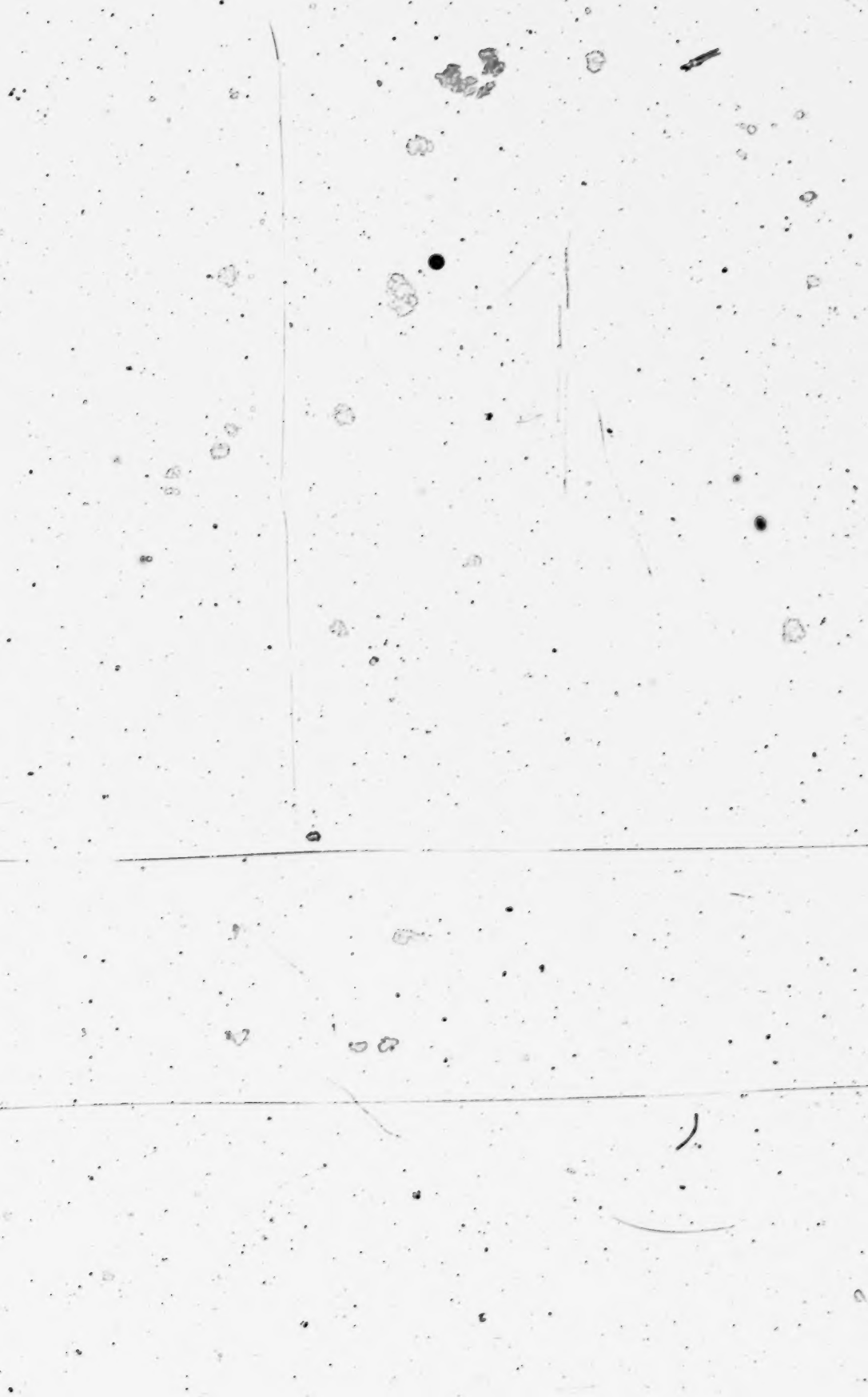
v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JAMES K. POLK,
Counsel for Petitioner.

Of Counsel:
RICHARD JOYCE SMITH
JULIUS M. JACOBS



INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision, Statutes and Rules of Procedure Involved	3
Statement	3
Reasons for Granting Writ	8
1. The Failure of the Court Below to Adhere to its Rule 48 Conflicts with the Practice in Other Federal Courts and is Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of this Court's Power of Supervision	8
2. The Court Below has Misconstrued and Misapplied the Standards and Criteria Enunciated by this Court for Determining the Scope and Application of Federal Rule 60(b)(6), as have Other Lower Courts. The Present Case Affords an Opportunity for Their Further Clarification	12
3. The Petitioner's Right of Due Process Under the Fifth Amendment has been Violated	17
Conclusion	18
Appendix	19
A. Judgment and order below	19
B. Constitution of the United States	20
C. Statutes involved	21

PAGE

D. Rules of the United States Court of Claims 22
Federal Rules of Civil Procedure 24

CITATIONS

CASES:

Ackermann v. *United States*, 340 U. S. 193 . . 8, 9, 12, 13, 15
Alma Motor Co. v. *Timken-Detroit Axle Co.*, 329 U. S. 129 17
American Brake Shoe Co. v. *Interboro Rapid Transit Co.*, 1 F. Supp. 820 10
Anderson v. *Yungkau*, 329 U. S. 482 8
Atlantic Coast Line R. Co. v. *Powe*, 283 U. S. 401 . . 6

Barber v. *Turberville*, C. A., D. C., 218 F. 2d 34 (1954) 14
Blackstone Memorial Ass'n, James v. *Gulf, Mobile & Ohio R. Co.*, 28 FRD 385 (D. C. Conn. 1961) . . . 10
Block v. *Thousandfriend*, 2 Cir., 170 F. 2d 428 17
Bolling v. *Sharpe*, 347 U. S. 497 17
Bridoux v. *Eastern Air Lines*, C. A., D. C., 214 F. 2d 207 14
Bushey v. *United States*, 109 F. Supp. 427 (C. Cls.) 10

Consolidated Edison Co. v. *United States*, 2 Cir., 279 F. 2d 152 7
Consolidated Edison Co. v. *United States*, 133 C. Cls. 376, 135 F. Supp. 881 6
Consolidated Edison Co. v. *United States*, No. 695, October Term, 1955 6
Curtis Industries, Inc., Helene v. *Dinerstein*, 17 FRD 223 (E. D. N. Y. 1955) 10

Davis v. *Wadsworth Construction Co.* v. *Waters*, 27 FRD 1 (D. C. Pa. 1961) 10

Endicott Johnson v. *Encyclopedia*, 266 U. S. 285 . . 17
Ex Parte Wall, 107 U. S. 265 17

PAGE

Federal Communications Comm. v. *WJR, The Goodwill Station*, 337 U. S. 265 17
Fox Publishing Co., Sam v. *United States*, 366 U. S. 683 8
Frank v. *New Amsterdam Casualty Co.*, 27 FRD 258 (D. C. Pa. 1961) 10

Galvan v. *Press*, 347 U. S. 522 17
Glidden Co., The v. *Zdanok*, No. 242 October Term 1961 10
Grecnspahn v. *Joseph E. Seagrams & Sons*, 2 Cir., 186 F. 2d 616 ..... 8, 13

Hickman v. *Taylor*, 329 U. S. 495 8

Interstate Circuit Inc. v. *United States*, 304 U. S. 55 ..... 9, 10

Johnson v. *Manhattan R. Co.*, 289 U. S. 479 10

Kiyono v. *Clark*, 20 Fed. Rules Serv. p. 875 10
Klapprott v. *United States*, 335 U. S. 601 ..... 8, 9, 12, 13, 14, 15, 16

Loucke v. *United States*, 21 FRD 305 (So. D. N. Y. 1957) 10

Mach v. *Pennsylvania R. Co.*, 198 F. Supp. 473 (D. C. Pa. 1961) 10
Mississippi Publishing Co. v. *Murphree*, 326 U. S. 438 8

Orris v. *Higgins*, 2 Cir., 180 F. 2d 537, cer. den. 340 U. S. 810 15

Patapoff v. *Vollstedts*, 9 Cir., 267 F. 2d 863 (1959). 14
Peters v. *Hobby*, 349 U. S. 331 17
Polites v. *United States*, 364 U. S. 426 ..... 6, 8, 12, 13, 15

Rochin v. *California*, 342 U. S. 165 17

PAGE

Rooks v. *American Brass Co.*, 6 Cir., 263 F. 2d 166 (1959) 14

Schillinger v. *United States*, 155 U. S. 163 9
State of Minnesota v. *United States*, 305 U. S. 382 9
Statliatos v. *Arnold Bernstein Steamship Co.*, 2 Cir., 202 F. 2d 525 8
Sunal v. *Large*, 332 U. S. 174 6
Sunbeam Corp. v. *Charles Appliances, Inc.*, 119 F. Supp. 492 (So. D. N. Y. 1953) 10
System Federation No. 91 v. *Wright*, 364 U. S. 642 ..... 8, 12, 13, 15

United RR Operating Crafts v. *N. Y. N. H. & Hartford R. Co.*, 15 FRD 365 (So. D. N. Y. 1953) 10
United States v. *Besser Mfg. Co.*, 125 F. Supp. 710, (D. C. Mich. 1954) 10
United States v. *Cato Bros.*, 4 Cir., 273 F. 2d 153 (1959) 14
United States v. *Consolidated Edison Co.*, 366 U. S. 380 ..... 4, 7, 16
United States v. *Failla*, 164 F. Supp. 307 (D. C. N. J. 1958) 10
United States v. *Karahalias*, 2 Cir., 205 F. 2d 331 14, 15
United States v. *1108 Acres of Land*, 25 FRD 205 (E. D., N. Y. 1960) 10
United States v. *72.71 Acres of Land*, 23 FRD 635 (D. C. Md. 1959) 10
United States v. *Sherwood*, 312 U. S. 584 9
United States v. *United States Gypsum Co.*, 333 U. S. 364 15
United States v. *Yellow Cab Co.*, 388 U. S. 338 15

Von Wedel v. *McGrath*, 100 F. Supp. 434 (D. C. N. J. 1951) 11

Walling v. *Harnischfeger Corp.*, 142 F. Supp. 202 (D. C. Wisc. 1956) 10
Weil v. *Neary*, 278 U. S. 160 9

PAGE

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION 2, 3, 17, 18

UNITED STATES JUDICIAL CODE (28 U. S. C.):

Section 451 ..... 3, 9, 10
1254(1) 10
1255(1) 1, 3, 10
1346(a) 11
1491 9
2071 ..... 3, 9
2072 3

UNITED STATES COURT OF CLAIMS RULES:

Rule 48 ..... 2, 3, 8, 18
49(c) 9
50 ..... 3, 8
54(b) 9
54(b)(5) 7, 16, 17
54(b)(6) 2, 3, 7, 8, 10, 12, 14, 15, 16, 17

FEDERAL RULES OF CIVIL PROCEDURE:

52(a) 2, 3, 18
54 3
60(b) 12
60(b)(1)(2)(3) 12, 13, 14
60(b)(5) 7, 13, 16
60(b)(6) 2, 3, 10, 12, 13, 14, 15, 16

MISCELLANEOUS:

Director of Administrative Office of the United States Courts, Report of 11
GCM 25298, 1947-2 C. B. 39 16
7 Moore, Federal Practice (2 Ed.) p. 283 16
4 Speeches of Edmund Burke (1816) 200-201 .. 17
61 Yale Law Journal, Note, 76 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Consolidated Edison Company of New York, Inc. prays that a writ of certiorari issue to review the judgment and order of the United States Court of Claims, entered in the above entitled case on December 6, 1961.

Citation to Opinion Below

The judgment and order of the Court of Claims is not officially reported and is set forth in Appendix A, p. 19, infra.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1).

Questions Presented

This case[1] raises important questions of practice and procedure in the Court of Claims which call for the exercise of this Court's power of supervision. It involves the uniform interpretation and application of the Court of Claims Rules with similar rules of the Federal Rules of Civil Procedure, the clarification of the standards and criteria established by this Court for the application of Federal Rule 60(b)(6) which have been misinterpreted and misapplied by lower courts, and the determination of the extent to which failure to adhere to duly promulgated rules of procedure violates the "due process" clause of the Fifth Amendment of the Constitution.

Specifically, the questions presented are:

1. Whether the denial of petitioner's motion for relief from the operation of an erroneous judgment, brought under Court of Claims Rule 54(b)(6)[2] and based upon the facts and circumstances therein set forth, must contain findings of fact and conclusions of law, as provided in Court of Claims Rule 48.[3]

2. Whether, in denying petitioner's motion for relief under its Rule 54(b)(6), the court below misinterpreted and misapplied the standards and criteria established by this Court for the application of its prototype, Federal Rule 60(b)(6).

3. Whether the denial by the Court below of petitioner's motion for relief under its Rule 54(b)(6) without making

---

[1] There are three cases involving refunds of federal income taxes for the years 1938, 1939 and 1941. For convenience they will be referred to as one case.

[2] Court of Claims Rule 54(b)(6) was fashioned after and is the counterpart of Federal Rule 60(b)(6).

[3] Court of Claims Rule 48 was fashioned after and is the counterpart of Federal Rule 52(a).

findings of fact and conclusions of law, as required by its Rule 48, violated petitioner's constitutional right of due process under the Fifth Amendment of the Constitution.

Constitutional Provision, Statutes, and Rules of Procedure Involved

The Fifth Amendment of the Constitution is set forth in Appendix B, p. 20, infra.

The statutory provisions involved, Sections 451, 2071 and 2072 of the United States Judicial Code (28 U. S. C. 1954 Ed.), are set forth in Appendix C, p. 21, infra.

The Rules of the United States Court of Claims involved, Rules 48, 50 and 54(b)(6), and their counterparts in the Federal Rules of Civil Procedure, Rules 52(a), 54(a) and 60(b)(6), are set forth in Appendix D, pp. 22-25, infra.

Statement

The petitioner had disputed the Government's position as to the time of accrual of contested but involuntarily paid real estate taxes imposed by the City of New York for the years 1938 to 1951, inclusive. The petitioner claimed that they accrued in the years the contests were settled while the Government maintained that they accrued in the years they were involuntarily paid. In 1954 that controversy was being carried on in the court below for the years 1938-1941[4] and at the administrative level in the Internal Revenue Service for the years 1942-1951.

---

[4] It was stipulated that under petitioner's theory petitioner was entitled to a refund for 1941 of $3,095,708.31; was subject to deficiencies for the years 1938 and 1939, which were still open, of $450,987.74 and $434,602.51, respectively; and would have been subject to a 1940 deficiency of $809,412.31 if that year had not been closed by the statute of limitations.

The Government obtained a suspension of the proceedings in the court below[5] and negotiations were had for the settlement of the entire controversy for the years 1938 through 1951, culminating in petitioner's written offer in compromise dated December 8, 1954.

The offer proposed to recompute petitioner's tax liability for each of the years 1938 through 1951 (without regard to the fact that many of those years were closed by the statute of limitations) on the legal principle that a contested real estate tax accrues in the year of settlement and not in the year it is involuntarily paid;[6] and to have the net amounts of the recomputations refunded to the petitioner for the years 1941 and 1951.[7]

After all aspects of the offer had been discussed with Government officials at a conference held at the Department of Justice on February 3, 1955, a Department official called attention to the fact that the Department's jurisdiction was limited to cases litigated in the United States courts and did not extend to the years 1942-1951 which were then before the Internal Revenue Service (whose representatives were also at the conference). Recognizing that the tax treatment of the contested real estate taxes in each of the years 1938 through 1951 was actually a single controversy, and to avoid two separate settlement procedures, it was suggested that the petitioner immediately institute a 1951 refund suit covering the income tax treatment of the contested real estate taxes for the years 1942-1951 so that the Department of Justice would have juris-

---

[5] After hearings were held before the Court of Claims Commissioner and his report thereon filed with the court below, and after petitioner's brief was filed on August 14, 1954, the Government obtained several extensions of time to file its answering brief, the last one extending its time to May 11, 1955.

[6] This Court later upheld this legal principle. *United States v. Consolidated Edison Co.*, 366 U. S. 380.

[7] The amounts refundable for the years 1941 and 1951, the years of settlement, exceeded the resulting deficiencies for the other years.

diction over the entire controversy for the years 1938 through 1951.[8] Petitioner immediately prepared and filed with the District Director of Internal Revenue of New York its 1951 refund claim; and in its transmittal letter of February 10, 1955, called attention to the fact that the claim presented the identical legal questions that were rejected in the 1941 refund claim, and continued:

> "There is now pending before the Assistant Attorney General an offer of settlement submitted by the taxpayer which contemplates settlement of the issue presented in both the 1941 and 1951 claims for refund, and of the consequential effects thereof upon all years from 1938 to 1951 inclusive. As soon as formal suit based upon the rejection of this 1951 claim for refund is filed, the Attorney General will be in a position to consider and act upon the pending offer of settlement covering all years from 1938 to 1951, inclusive."

The District Director rejected this claim and a supplemental protective claim[9] by letters dated March 28, 1955 and May 9, 1955, respectively. Meanwhile, the Department of Justice, by letter dated May 4, 1955, rejected petitioner's offer in compromise and the suspended proceedings in the

---

[8] Prior to this conference the Government, in its January 11, 1955 request for an extension of time to file its brief, stated that "it may result in a saving of time and expense and in an amicable settlement of the instant cases"; and after this conference the Government, in its February 10, 1955 request for an additional extension of time, stated: "Counsel asks for additional time to permit continued study of the problem whether the above styled suits, six others pending in this Court, and additional years in suit may be settled. A conference was held in Washington on February 3, 1955 between counsel for the respective parties, with representatives of the Chief Counsel for the Internal Revenue Service present, and it now appears that approximately sixty days will be required to reach a decision."

[9] On Audit of petitioner's 1952 return, the Revenue Agent questioned an abandonment loss deduction on the ground it was properly deductible in 1951. He later allowed the deduction in 1952 and the protective claim was withdrawn.

court below were then resumed.[10] The contemplated suit on the 1951 refund claim was thereupon held in abeyance to await the outcome of the present case.

On December 6, 1955, the court below rendered its decision against the petitioner and held that the contested real estate taxes accrued in the year they were involuntarily paid.[11] In opposing petitioner's application to this Court for a writ of certiorari, the Government argued the absence of a conflict and called attention to the fact that the New York Telephone Company, which had filed an *amicus curiae* brief, had identical issues pending which it intended to test in the District Court for the Southern District of New York,[12] and concluded:[13]

> "The decision below is correct. There are no conflicting decisions which require review by this Court at the present time. Accordingly, the petition for a writ of certiorari should be denied."

Certiorari was denied on April 23, 1956. Since such denial was not a determination of the merits of the question,[14] the petitioner, convinced that its own position on the question was correct and that the Court of Claims had erred, filed suit on June 6, 1956, on the 1951 refund claim in the Southern District of New York (hereinafter referred to as the New York case) in the firm belief that its position would be sustained by the Court of Appeals for the Second Circuit and that the resulting conflict in decisions would

---

[10] The Government filed its answering brief on the extended due date, May 11, 1955, and the case proceeded, in due course, to judgment.

[11] *Consolidated Edison Co.* v. *United States*, 133 C. Cls. 376; 135 F. Supp. 881.

[12] That suit was later settled by the Government for $1,000,000.

[13] See p. 16 of Government's brief filed in this Court in *Consolidated Edison Co.* v. *United States*, No. 695, October Term, 1955.

[14] *Polites* v. *United States*, 364 U. S. 426, 433 fn. 9; *Sunal* v. *Lange*, 332 U. S. 174, 181; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403.

ultimately be resolved in petitioner's favor by this Court. As events turned out, the Second Circuit did uphold petitioner's position and, disagreeing with the court below, held that the contested real estate taxes accrued in the year of settlement.[15] On the basis of that conflict this Court granted certiorari.[16] So far as we can ascertain, that was the first time certiorari was granted in a tax case, where the same person was the taxpayer in the conflicting decisions which served as the basis for certiorari. On May 22, 1961, this Court affirmed the decision of the Court of Appeals for the Second Circuit in the New York case and held, contrary to the decision of the court below, that the contested real estate taxes accrued in the year of settlement and not in the years they were involuntarily paid.[17]

On June 30, 1961, two weeks after this Court's affirmance in the New York case became final, petitioner moved in the court below, under its Rule 54(b)(6)[18] for relief from the erroneous judgment it had previously entered, setting forth the aforementioned facts and circumstances. The motion was based on the ground that the New York case and the present case were part of a single controversy which had existed between the parties—and was treated as such by them—before any judgment was rendered in either case;[19] and that though in form, that controversy became involved in two separate suits, in substance, the New York case was but a continuation of that single controversy, partially and erroneously decided by the court below in the first instance.

---

[15] *Consolidated Edison Co.* v. *United States*, 279 F. 2d 152.

[16] 364 U. S. 890.

[17] *United States* v. *Consolidated Edison Co.*, 366 U. S. 380.

[18] The motion was also based on (b)(5)—the counterpart of Federal Rule 60(b)(5). This basis is not pressed for review except that to the extent the facts fall short of qualifying under (b)(5) they constitute another reason for the application of (b)(6). See footnote 43, at pp. 16-17, infra.

[19] This Court has observed that the two cases "involved the same parties, facts, and question . . . though in respect to [different] years." *Consolidated Edison* case, 366 U. S. at p. 389.

The Government did not deny any of the facts set forth in the motion papers. It isolated this Court's decision in the New York case from the other facts which led up to that suit and argued, among other things, that this isolated fact did not justify the relief sought, ignoring completely the basis of petitioner's motion—that the *combination* of all those facts produced the peculiar and extraordinary circumstances contemplated by Rule 54(b)(6).

The Court below overruled petitioner's motion without rendering an opinion and without making any findings of fact and conclusions of law, as required by its Rule 48.

Reasons for Granting Writ

1. The failure of the Court below to adhere to its Rule 48 conflicts with the practice in other Federal Courts and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Rule 48 of the Court of Claims Rules provides that "[i]n all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law and direct the entry of an appropriate judgment"; and by definition, the term judgment "includes any decree or order subject to a petition for writ of certiorari." (Rule 50) The denial of a 54(b)(6) motion is a final order that is subject to a petition for certiorari.[20] Though the facts

[20] In *Polites* v. *United States*, 364 U. S. 426, 427, "[c]ertiorari was granted to consider the availability of Rule 60(b) relief in the circumstances [there] presented." See also *System Federation No. 91* v. *Wright*, 364 U. S. 642, 646; *Ackermann* v. *United States*, 340 U. S. 193, 195; *Klapprott* v. *United States*, 335 U. S. 601, 613-615. Cf. *Greenspahn* v. *Joseph E. Seagrams & Sons*, 2 Cir., 186 F. 2d 616, 618-19; *Stathatos* v. *Arnold Bernstein Steamship Co.*, 2 Cir., 202 F. 2d 525, 527. This Court has also granted certiorari to review decisions involving other rules of the Federal Rules of Civil Procedure in *Hickman* v. *Taylor*, 329 U. S. 495; *Anderson* v. *Yungkau*, 329 U. S. 482; *Mississippi Publishing Co.* v. *Murphree*, 326 U. S. 438; and *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683.

were uncontroverted, the court still had to evaluate them, i.e., weigh the equities, in order to determine whether they met the criteria established by this Court—extraordinary circumstances—"justifying relief".[21] Furthermore, Rule 54(b) itself contemplates such findings, for it provides that it "does not limit the power of the court to entertain an independent action to relieve a party from judgment, order, or proceeding * * *"; and in such an alternative action a decision of dismissal on the uncontroverted testimony at the close of the plaintiff's case must, under Rule 49(c), contain findings of fact and conclusions of law.[22]

The Court of Claims rules were promulgated in compliance with the Congressional direction that the court prescribe rules consistent with the Acts of Congress and the rules prescribed by this Court.[23] "It is clear that a rule of court thus authorized and made has the force of law."[24] Such compliance is a requisite for the court's exercise of the jurisdiction conferred upon it when Congress waived the immunity of the United States from suit by enacting § 1491 of 28 U. S. C.; for in waiving such immunity Congress may impose whatever conditions it deems necessary.[25] Although promulgation of the rules may have satisfied the jurisdictional prerequisite, the Court of Claims may not

---

[21] Cf. *Klapprott* v. *United States*, 335 U. S. at p. 613; *Ackermann* v. *United States*, 340 U. S. at pp. 197-198, 202.

[22] See Appendix D, p. 22, infra.

[23] 28 U. S. C. §§ 451, 2071. See the Foreword to the official publication of the Court of Claims Rules, Revised December 2, 1957. The Federal Rules of Civil Procedure, upon which they were "predicated", were both prescribed by this Court and approved by Congress.

[24] *Weil* v. *Neary*, 278 U. S. 160, 169. See also *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55, 56.

[25] *United States* v. *Sherwood*, 312 U. S. 584, 591; *State of Minnesota* v. *United States*, 305 U. S. 382, 388-389; *Schillinger* v. *United States*, 155 U. S. 163, 166.

nullify that prerequisite by failing to adhere to them.[26] Such a situation can be remedied only by the exercise of this Court's power of supervision.[27]

The failure of the court below to make the requisite findings and conclusions, or, in lieu thereof, to render an opinion in which the facts and conclusions are discussed, is contrary to its own precedent in *Bushey* v. *United States*, 109 F. Supp. 427.[28] It is also contrary to, and in conflict with, the practice in the District Courts where decisions denying motions under Federal Rule 60(b)(6)—the prototype of Court of Claims Rule 54(b)(6)—contain opinions discussing the facts and law involved.[29] Such conflicting application of identical rules of procedure by the Court of Claims and the District Courts calls for the exercise of this

---

[26] Compare *American Brake Shoe Co.* v. *Interboro Rapid Transit Co.*, 1 F. Supp. 820, 824 and related case, *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 503-504.

[27] The controversy pending in this Court as to whether the Court of Claims is a "legislative" or "constitutional" court (*The Glidden Co.* v. *Zdanok*, No. 242 October Term 1961) does not affect this question. Whichever it is, it is nevertheless "a court of the United States" (28 U. S. C. § 451) performing judicial functions that are subject to review by this Court just as are the Courts of Appeals (28 U. S. §§ 1255(1), 1254(1)).

[28] Cf. *Interstate Circuit Inc.* v. *United States*, 304 U. S. 55. It is even contrary to the dissent in that case (p. 58).

[29] *James Blackstone Memorial Ass'n* v. *Gulf, Mobile & Ohio R. Co.*, 28 FRD 385 (D. C. Conn. 1961); *Mach* v. *Pennsylvania R. Co.*, 198 F. Supp. 473 (D. C. Pa. 1961); *Davis* v. *Wadsworth Construction Co.* v. *Waters*, 27 FRD 1, (D. C. Pa. 1961); *Frank* v. *New Amsterdam Casualty Co.*, 27 FRD 258 (D. C. Pa. 1961); *United States* v. *1108 Acres of Land*, 25 FRD 205 (E. D., N. Y. 1960); *United States* v. *7271 Acres of Land*, 23 FRD 635, 640 (D. C. Md. 1959); *United States* v. *Failla*, 164 F. Supp. 307 (D. C. N. J. 1958); *Loucke* v. *United States*, 21 FRD 305 (So. D. N. Y. 1957); *Walling* v. *Harnischfeger Corp.*, 142 F. Supp. 202 (D. C. Wisc. 1956); *Helene Curtis Industries, Inc.* v. *Dinerstein*, 17 FRD 223 (E. D. N. Y. 1955); *United States* v. *Besser Mfg. Co.*, 125 F. Supp. 710, 713 (D. C. Mich. 1954); *Kiyono* v. *Clark*, 20 Fed. Rules Serv. pp. 875, 878 (Dist. of Col. 1955); *United RR Operating Crafts* v. *N. Y., N. H. & Hartford R. Co.*, 15 FRD 365 (So. D. N. Y. 1953); *Sunbeam Corp.* v. *Charles Appliances, Inc.*, 119 F. Supp. 492 (So. D. N. Y.

(Footnote continued on next page)

Court's power of supervision. This becomes even more necessary when it is borne in mind that the District Courts have, in certain instances, concurrent jurisdiction with that of the Court of Claims to entertain suits against the United States.[30] Congress did not intend its waiver of the immunity of the United States through parallel courses of suit in the Court of Claims and in the District Courts to be construed and applied differently depending upon the forum the claimant chose to enter.[31]

1953); *Von Wedel* v. *McGrath*, 100 F. Supp. 434 (D. C. N. J. 1951). Many Court of Appeals decisions also indicate that many unreported decisions in the District Courts below were accompanied by opinions discussing the facts and law involved.

[30] 28 U. S. C. § 1346(a).

[31] The annual report of the Director of the Administrative Office of the United States Courts covering fiscal year 1959/1960 discloses that on June 30, 1960 there were pending in all of the United States District Courts the following number of suits against the United States (Table C 3a, p. 240):

Review of Actions of Federal Agencies		1,423
Habeas Corpus—Deportations	27	
Others	276	303
		1,755
Tort Claims		2,067
Tax Suits		764
Other		
Total		6,312

But no data is given as to the dollar amounts involved.

For the United States Court of Claims the following data is given for the court year ending October 1, 1960 (Table G3):

Total cases pending Oct. 3, 1959	6,028
Cases commenced during year	2,277
Cases terminated during year	1,375
Total cases pending Oct. 1, 1960	6,930
Total amounts claimed by plaintiffs (does not include amounts involved in 64 petitions where amounts were not stated)	$105,992,794.33
Amounts of judgments rendered in favor of plaintiffs	$8,096,234.85
Amounts of judgments rendered in favor of United States on counterclaims	$170,011.34

This question is of importance not only to petitioner but to all claimants who bring suit against the United States in the Court of Claims. Unless this Court's power of supervision is exercised such claimants will be deprived of recourse to this Court whenever a motion calling for findings of fact and conclusions of law is decided by the Court of Claims on some unannounced or undisclosed principle of law which is in direct conflict with either a decision of this Court or a decision of a Court of Appeals, or is decided on some other unannounced and undisclosed reason which, if made known, would prompt this Court to grant certiorari.

2. The Court below has misconstrued and misapplied the standards and criteria enunciated by this Court for determining the scope and application of Federal Rule 60(b)(6), as have other lower courts. The present case affords an opportunity for their further clarification.

Federal Rule 60(b) provides five specific categories where an aggrieved litigant may seek relief from a previously entered judgment and a sixth general category—"any other reason justifying relief".

On four previous occasions this Court considered the scope and application of Federal Rule 60(b)(6),—the prototype of Court of Claims Rule 54(b)(6). *Klapprott* v. *United States*, 235 U. S. 601; *Ackermann* v. *United States*, 340 U. S. 193; *Polites* v. *United States*, 364 U. S. 426; *System Federation No. 91* v. *Wright*, 364 U. S. 642. Klapprott sought relief from a denaturalization order entered on default; Ackerman sought relief from a denaturalization order which had not been appealed; Polites sought relief from a denaturalization order (appeal from which had been dismissed on consent) because of a subsequent change in the law; and Federated System sought relief from a consent injunction because of a subsequent change in the law.

In *Klapprott* the Government argued that the petition for relief disclosed, at most, "excusable neglect" under 60(b(1), but that relief was barred by the one-year limita-

tion in (b)(1). This Court rejected that argument and pointed out that the facts in the case produced an "extraordinary" situation which was *more* that "excusable neglect" and which came within the equitable purpose and residual meaning of (b)(6)—"any other reason justifying relief". It was also made clear that relief under (b)(6) was available only for reasons *other* than those stated in the five preceding clauses—that (b)(6) and the other clauses were mutually exclusive—and that there was no statute of limitations for a (b)(6) motion other than that it "shall be made within a reasonable time". In *Ackermann* a further refinement of the criteria and guide lines for the application of (b)(6) was established, namely, that a deliberate omission or failure to proceed with a case, no matter how well intentioned or ill advised, is not a basis for relief under (b)(6). In *Polites*, the "free, calculated, and deliberate" abandonment of the appeal from the denaturalization order was considered within *Ackermann*; but it was found unnecessary to so hold because there was no subsequent change of the law, as maintained by the petitioner. A vigorous dissenting opinion, expressing the views of four members of this Court, distinguished *Ackermann* (where an appeal would have procured a reversal) from *Polites* (where the prosecution of the appeal would have been fruitless in view of the then existing law), and expressed the view that the subsequent change in the law warranted relief under (b)(5). In *System Federation*, this Court reversed the denial of relief from a consent injunction, sought under (b)(5) and (b)(6), because the District Court was wrong as a matter of law—abused its discretion[32]—in disregarding significant changes which converted the decree into an instrument of wrong, and in failing to strike a proper balance between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances.[33]

---

[32] The "discretion [of District Courts] is never without limits • • •." 364 U. S. at p. 643. See also *Greenspahn* v. *Joseph E. Seagram & Sons*, 2 Cir., 186 F 2 616, 619.

[33] 364 U. S. at pp. 647-648.

At first, the Second Circuit, per L. Hand, J., speaking for a unanimous court, misconstrued *Klapprott* and held that "subsection (6) [must] be read as providing an exception to subsection (1) * * * (2) and (3)"; that if (b)(6) were to be "confined to situations not covered by the first three subsections, [it] would be extremely meagre, even assuming we could find any scope for it at all"; and that (b)(6) gives "the court a discretionary dispensing power over the limitation imposed by the Rule itself in subsections (1), (2) and (3)."[34] But on rehearing the court acknowledged its failure to note its "divergence from the majority's reasoning [in Klapprott]" and corrected itself.[35] However, other lower courts have continued to misconstrue the language of this Court in *Klapprott* and have resorted to (b)(6) as a means of circumventing the one-year limitation in the first three clauses in order to "accomplish justice".[36] The one-year limitation in (b)(1) has been used also as a measuring rod to determine whether a motion under (b)(6) had been "made within a reasonable time."[37]

The standards and criteria established by this Court for the application of Federal Rule 60(b)(6) are equally applicable to Court of Claims Rule 54 (b)(6). Their proper application to the uncontroverted facts in the instant case (which are few and uncomplicated and do not involve "demeanor" appraisal of oral testimony) i.e., the weighing

---

[34] *United States* v. *Karahalias*, 205 F. 2d 331, 333.

[35] Idem, at p. 335.

[36] *United States* v. *Cato Bros.*, 4 Cir., 273 F. 2d 153 (1959); *Patapoff* v. *Vollstedt's*, 9 Cir., 267 F. 2d 863 (1959); *Rooks* v. *American Brass Co.*, 6 Cir., 263 F. 2d 166 (1959); *Barber* v. *Turberville*, C. A., D. C., 218 F. 2d 34 (1954). See also Note in 61 Yale L. J. 76, 81-86 and cases cited in footnote 36 at p. 83. Some of the decisions, as do the authors of the Law Journal Note (p. 84), attribute this indirect extension of the one-year limitation to the language of this Court in *Klapprott*.

[37] *Bridoux* v. *Eastern Air Lines*, C. A., D. C., 214 F. 2d 207.

of the equities involved, is a question of law which is subject to review by this Court.[38] Even if it were considered a question of fact, it is reversible, if clearly erroneous.[39]

The petitioner maintains that the court below has misapplied the standards and criteria established by this Court and has committed reversible error in failing to grant petitioner's motion for the relief sought. While it is not appropriate in the present posture of the case to argue its merits, it may not be amiss to point out that the facts in this case present a situation which Judge Hand originally believed could not be found, if (b)(6) were to be considered "no more than a kind of receptable for vestigial equities."[40] The basis for the relief sought in this case is not covered by any of the other subdivisions of the Rule, nor is it similar to the bases for the relief sought in the *Klapprott*, *Ackermann*, *Polites* and *System Federation* cases. Here, there was neither default nor abandonment or failure to proceed with the litigation at hand. Nor was there any consent to the adverse judgment. On the contrary, there was a persevering prosecution of the litigation at hand until it resulted successfully in the establishment by this Court of the legal principle sought. This case, therefore, affords an opportunity to further clarify the equitable considerations which underlie (b)(6) in its endeavor to strike a proper balance between two pervasive goals in our legal system—the finality of judicial determinations and the desire that justice be accomplished between litigants.[41] It also affords an opportunity to explain

---

[38] Compare *System Federation No. 91* v. *Wright*, 364 U. S. 642; *Klapprott* v. *United States*, 340 U. S. 193.

[39] *United States* v. *Yellow Cab Co.*, 388 U. S. 338, 341-342; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-395; *Orvis* v. *Higgins*, 2 Cir., 180 F. 2d 537, 539-540 cer. den. 340 U. S. 810.

[40] *United States* v. *Karahalias*, 205 F. 2d at p. 333.

[41] Compare statement of this Court in *System Federation*, 364 U. S. at pp. 647-648. One of the questions raised in the instant case is whether the Government, in the light of all of the facts could really claim the "repose" which a judgment ordinarily furnishes a successful litigant.

the extent to which substance, rather than the form of "other common law remedial tools", was intended to circumscribe the boundaries of (b)(6), when this Court stated:[42]

> "... 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these [writs of coram nobis, audita querela, etc.] and other common law remedial tools. In simple English, the language of the 'other reason' clause except for the five particularly specified vests power in courts to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Another question presented by this case, which though probably considered has not been fully expressed previously, is whether a *combination* of facts which, in their entirety, may be sufficient to produce that "peculiar" or "extraordinary" situation contemplated by (b)(6) to warrant relief thereunder, is to be taken apart and each fact considered separately for its sufficiency for relief under (b)(6). Regardless of whether this Court will ultimately agree with the petitioner's view of the merits on these questions, a decision thereon will afford this Court an opportunity to further clarify the standards, criteria and guide lines for the application of (b)(6) in a factual background other than relief from a denaturalization order or injunction, and which will leave no room for misinterpretation or misapplication by lower courts as to whether (b)(6) is an exception to, an extention of, or in any way dependent upon the other five subsections of the Rule. It will also afford an opportunity to consider to what extent a situation which falls short of (b)(5) could nevertheless fall within (b)(6).[43]

---

[42] *Klapprott*, 335 U. S. at pp. 614-15.

[43] See 7 Moore, Federal Practice (2nd Ed.) p. 283. The motion in the court below was also predicated on (b)(5) because the erroneous judgment had been based, in part, on GCM 25298, 1947 —2 C. B. 39 which this Court in the *Consolidated-Edison* case, held to be erroneous, and that "the Commissioner of Internal Rev-

(Footnote continued on next page)

3. The petitioner's right of due process under the Fifth Amendment has been violated.

The constitutional question in the present case, if reached,[44] is fundamental. With all its vague contours and variable content, the basic principle of procedural due process under the Fifth Amendment is that the litigant be afforded a "fair hearing".[45] An essential element of such a fair hearing is the historically developed prerequisite for judges "publicly to give a reasoned opinion from the bench in support of their judgment upon matters that are stated before them. * * * that course hath prevailed from the oldest of times. It hath been so general and so uniform, that it must be considered the law of the land."[46] For of what avail is the constitutional guarantee of a fair hearing, if after a hearing, one is deprived of his property[47] without knowing the reason therefor? The right to a "reasoned opinion" is so rooted in the traditions and conscience of our people as to be inherent in our concept of

---

enue will, of necessity, have to revoke or modify the GCM". See *Block* v. *Thousand-friend*, 2 Cir., 170 F. 2d 428. Professor Moore is of the opinion that even if (b)(5) is held not to extend to the reversal of administrative determinations upon which the judgment was based, such situations properly fall within (b)(6).

[44] It is recognized that the declared policy of this Court is to dispose of matters, if possible, on other than constitutional grounds. *Peters* v. *Hobby*, 349 U. S. 331, 338; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129, 136. The constitutional question, however, emphasizes the merit of this application and underscores the fact that the first reason, supra, for granting the writ is an *a fortiori* argument in support thereof.

[45] *Federal Communications Comm.* v. *WJR, The Goodwill Station*, 337 U. S. 265, 275; *Ex Parte Wall*, 107 U. S. 265, 289; *Galvan* v. *Press*, 347 U. S. 522, 530; *Bolling* v. *Sharpe*, 347 U. S. 497, 499; *Endicott Johnson* v. *Encyclopedia*, 266 U. S. 285, 288.

[46] Burke's observations on method of ascertaining law by judges, 4 Speeches of Edmund Burke (1816), 200-201. Cited and quoted in *Rochin* v. *California*, 342 U. S. 165, 170, fn. 4.

[47] It is conceded in the present case that the government has erroneously collected more than $1,300,000 principal amount of taxes from the petitioner, recovery of which is forever barred by the denial of the motion in the court below. See fn. 4, p. 3, supra.

due process without specifically providing for it. Nevertheless, both Congress and this Court, in promulgating and approving Federal Rule 52(a), did actually provide for such "reasoned opinion"; and so did the Court of Claims in promulgating its Rule 48. In failing to give that "reasoned opinion" when it denied petitioner's motion for relief from its admittedly erroneous judgment, the court below not only ignored its own rules but deprived petitioner of its right to due process under the Fifth Amendment.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES K. POLK,
Counsel for Petitioner.

Of Counsel:
RICHARD JOYCE SMITH
JULIUS M. JACOBS

February 1962

APPENDIX A

Judgment and Order of Court Below

IN THE

UNITED STATES COURT OF CLAIMS

235-60 BUELL F. BRANDT,
49654, 49655 & 50432 CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
v.
THE UNITED STATES.

ORDER

These cases come before the court on motion for new trial or to vacate judgments under Rules 53 or 54 of the rules of this court and, on consideration thereof,

IT IS ORDERED this sixth day of December, 1961, that said motions be and the same are overruled as follows:

235-60 Buell F. Brandt. Plaintiff's motion.

49654, 49655 & 50432 Consolidated Edison Company of New York, Inc. Plaintiff's motion.

BY THE COURT
Marvin Jones
Chief Judge

APPENDIX B

Constitution of The United States

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

United States Judicial Code (28 U. S. C.)

§ 451. DEFINITIONS

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the United States District Court for the District of Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

§ 2071. RULE-MAKING POWER GENERALLY

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

§ 2072. RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

APPENDIX D

Rules of the United States Court of Claims

Rule 48. Findings by the Court

In all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law and direct the entry of an appropriate judgment. The Court may adopt the Commissioner's report, including conclusions of fact and of law, or may modify it, or may reject it in whole or in part, or may direct the Commissioner to receive further evidence, or may refer the case back to him with instructions. Due regard shall be given to the opportunity of the trial Commissioner to judge of the credibility of the witnesses, and the findings of fact made by the Commissioner will be presumed to be correct.

Rule 49. Dismissal of Actions

* * *

(c) Insufficiency of Evidence: (1) Promptly after the plaintiff has completed the presentation of his evidence, the defendant may by motion to the Commissioner ask for a dismissal of the action by the Court on the ground that upon the facts and the law the plaintiff has not shown a right to recover: * * * (3) if, upon a consideration of the motion and the opposition thereto, the Commissioner is convinced that the motion should be granted by the Court, he shall so state in his ruling on the motion * * * the Commissioner shall make and file his findings of fact material to the issues raised by the motion and his recommendation for conclusions of law thereon. * * * Thereafter, all proceedings shall be the same as in a case where a Commissioner's report is filed upon the entire evidence produced by both parties. * *

Rule 50. Judgment

Definition: "Judgment" as used in these rules includes any decree or order subject to a petition for writ of certiorari.

Rules of the United States Court of Claims

Rule 54. Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence; surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

APPENDIX D

Federal Rules of Civil Procedure

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for finidings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion of memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

• • •

RULE 54. JUDGMENTS; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

• • •

RULE 60. RELIEF FROM JUDGMENT OR ORDER

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. v. THE UNITED STATES

OCTOBER TERM, 1961—NO. 757

APPENDIX E TO PETITION FOR CERTIORARI

JUDGMENT SOUGHT TO BE VACATED BY MOTION IN COURT BELOW

UNITED STATES COURT OF CLAIMS

Nos. 49634, 49655 and 50432

(Decided December 6, 1955)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. v. THE UNITED STATES

Mr. James K. Polk, for the plaintiff. *Messrs. Robert E. Coulson, Harold F. Noneman*, and *Gerald D. Groden* were on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for the defendant. *Messrs. Andrew D. Sharpe* and *Lee A. Jackson* were on the briefs.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover income taxes alleged to have been overpaid for the calendar years 1938, 1939 and 1941. The plaintiff kept its books and filed its income tax returns upon the accrual basis. The primary issue presented in these three cases is what year is the proper year for deduction of contested real estate taxes where payment of the full amount of the tax assessed was made to the City and State of New York within the taxable years, but the correct amount of the liability was not settled until a subsequent taxable year.

The facts, which are fully set forth in the findings, are summarized for the purposes of this decision as follows:

The plaintiff is a public utility corporation engaged in the manufacture, distribution and sale of electrical energy

and gas. During the years involved the plaintiff owned many hundreds of parcels of real estate in the City of New York which were subject to a tax under the laws of the State and City of New York on real estate owned by corporations.

Each parcel of real estate was appraised by the City Tax Commission and its value was placed upon a tentative assessment roll. Administrative proceedings were available to plaintiff to correct erroneous valuations. An application for correction of assessment (sometimes called a protest) had to be filed on forms supplied by the Tax Commission and all pertinent questions thereon had to be answered. One of the questions in the protest which had to be answered was "What do you consider was the full value of the property on January 25 of this year?" Failure to answer this question was fatal to the application. Judicial review was available by way of a certiorari proceeding, an exclusive remedy, only upon exhaustion of the administrative procedure.

In all cases, except where illegality of the tax in its entirety was alleged rather than to its form or method, the petition for judicial review had to set forth, as did the plaintiff's original protest, what the full value of the property was claimed to be. Thus in complying with the requirement of the law of New York, and alleging both in the protest and in the petition to the court the claimed full value of the property involved, a taxpayer admitted liability for real estate tax thereon in a certain and definite amount, namely, the claimed value of the property multiplied by the established tax rate.

The institution or pendency of litigation for the correction of an assessment did not postpone the dates the bills for the real estate taxes became due and payable. Failure to pay the tax bills when due subjected the property involved to a tax lien which had the effect of a judgment lien which could have been foreclosed and the property sold. In addition, a penalty of interest at 7 percent per annum

was incurred. There was no provision in the New York law for suspending or removing the tax lien, whether by injunction, bond or otherwise, other than by payment of the taxes thereon, as billed. Thus an aggrieved property owner had to first pay the real estate taxes and then seek to rectify the error by the exclusive remedy or run the risk, in addition to incurring 7 percent interest, of having the tax lien foreclosed and the property sold.

The parties have agreed that the facts are accurately reflected in the following simplified example, for the taxable year 1939, which is applicable to all the years involved. For the year 1939 plaintiff was notified, on January 25, 1939, of a tentative assessment for real estate taxes in the amount of $100. Within the statutory period and by March 15, 1939, plaintiff, based upon the best judgment of its officers, duly filed a bona fide protest admitting liability in the amount of $85, and petitioning for an administrative reduction of the tentative assessment in the amount of $100 by the amount of $15. After a hearing duly held, and on or about May 25, 1939, final assessment was made in the amount of $100. Thereafter, on or about October 1, 1939, under protest and for the stated purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all rights, plaintiff made payment of the assessed tax in the amount of $100. Within the statutory period, on October 25, 1939, certiorari proceedings were instituted admitting liability in the amount of, and denying liability in excess of, $85. On August 21, 1941, the Supreme Court of the State of New York entered its order in the certiorari proceedings fixing the tax liability at $95. In October 1941, plaintiff received a refund of the excess payment in the amount of $5.

The plaintiff accrued on its books and deducted on its Federal tax returns for 1939 the full $100. Upon audit the Commissioner of Internal Revenue allowed only $95 for that year, but included the $5 refund received in 1941, as

income for 1941. The defendant now concedes that if only a $95 deduction is allowed for 1939, then the $5 refund should not be included as income in 1941. Timely claims for refunds based upon, among other things, an understatement of depreciation and amortization for 1938, 1939, and 1941 were made and partially allowed by the Commissioner. However, the Commissioner offset these refunds by adjustments made because of his treatment of the real estate tax involved in this case.

The defendant raises pro forma the question of the statute of limitations in cases Nos. 49654 and 49655. It states that since plaintiff filed its claims for refund for 1938 and 1939, on March 10, 1942, and March 11, 1943, respectively, plaintiff could have sued within six months thereafter and therefore its petitions in those two cases, filed on May 25, 1950, are barred by 28 U. S. C. § 2501. This question has been decided by our decision in *Detroit Trust Company* v. *United States*, 131 C. Cls. 223, where we held that § 3772 of the Internal Revenue Code of 1939, as amended, was the governing statute of limitations and that the six-year statute of limitations contained in 28 U. S. C. § 2501 was not applicable. The petitions in all three of plaintiff's cases were therefore timely filed.

The plaintiff contends that it should be allowed deductions in 1938, 1939, and 1941 of the amounts of real estate taxes admitted in those years to have been due ($85); deductions in 1941 upon termination of the litigation of the additional amounts of taxes determined to be due over and above the amounts previously admitted ($10); and exclusion from 1941 income of amounts of excess payments of real estate taxes in the prior years which were refunded in 1941 ($5). The defendant's present position is that plaintiff is entitled to deductions in 1938, 1939, and 1941 of amounts of real estate taxes paid in those years ($100), and the inclusion in 1941 income of the amounts of excess payments of real estate taxes for those years which were refunded in 1941 ($5).

The pertinent provisions of the applicable sections of the Internal Revenue Code (26 U. S. C.) are set forth below.[1]

The plaintiff's argument is twofold. First, it argues that in order to accrue a deductible item, admission or absence of denial of liability is necessary, relying on *United States* v. *Anderson*, 269 U. S. 422; *Dixie Pine Products Co.* v. *Commissioner*, 320 U. S. 516, and *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281. Second, it argues that generally accepted accounting principles require that the disputed portion of a tax liability, although paid, should not be accrued until liability is established. The plaintiff, citing *United States* v. *Olympic Radio & Television, Inc.*, 349 U. S. 232; and *Lucyt Corporation* v. *Commissioner*, 349 U. S. 237, contends that these recognized accounting principles are highly persuasive on questions of accruals.

The defendant contends that our decision in *Chestnut Securities Co.* v. *United States*, 104 C. Cls. 489, is controlling.

In our opinion the rule stated in the *Chestnut Securities* case is applicable in the instant case. In that case the taxpayer, on the accrual basis, paid 1936, 1937 and 1938 state taxes after a District Court decision in 1940. The Circuit Court affirmed and the Supreme Court denied certiorari in 1942. The taxpayer contended in a suit in this court that the state taxes were deductible in 1940 when paid and the

---

[1] Sec. 23. Deductions from gross income. In computing net income there shall be allowed as deductions: * * * (c) Taxes generally. * * * Taxes paid or accrued within the taxable year * * *.

Sec. 41. General rule. The net income shall be computed upon the basis of the taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer * * *.

Sec. 43. Period for which deductions and credits taken. The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

Sec. 48. Definitions. When used in this chapter—(c) "paid or incurred," "paid or accrued." The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

defendant contended that they were deductible in 1942 when the litigation was finally decided. We held they were deductible in 1940 because payment discharged the liability and accrued the taxes in that year. The Commissioner of Internal Revenue has adopted and is following this rule. C. B. 1947–2, G. C. M. 25298, pp. 39, 43, 44. The plaintiff asserts that the case is either distinguishable or erroneous.

It is settled that a taxpayer may not accrue an expense when he is denying liability and refusing and contesting its payment. *Dixie Pine Products Co.* v. *Commissioner, supra; Security Flour Mills Co.* v. *Commissioner, supra.* The plaintiff argues from this principle that there must therefore be an admission or absence of denial of liability before an item may be accrued and that the payment of the liability within the taxable year has no effect on its accrual since payment was made under protest and litigation was immediately started to obtain a repayment. This is not necessarily true.

Under the accrual system of accounting revenues are accrued as nearly as practicable to the period earned and expenses, which include taxes, are accrued in the period and against the revenues they helped to produce. Our system of taxation requires a determination of taxes on an annual basis predicated on the economic events which occurred and were in existence during a taxable year. *United States* v. *Anderson, supra; Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Security Flour Mills Co.* v. *Commissioner, supra.* The Supreme Court stated that:

> • • • Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. • • • [*Burnet* v. *Sanford & Brooks Co., supra*, at p. 365; *Security Flour Mills Co.* v. *Commissioner, supra*, at p. 286.]
>
> • • • The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the

> obligation to pay, has become final and definite in amount. * * * [*Security Flour Mills Co.* v. *Commissioner*, *supra*, at pp. 286, 287.]

When expenses are incurred and therefore should be accrued under the accrual method of accounting for tax purposes, is determined from a practical, not a technical legal test. *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

Insofar as the plaintiff in the instant case was concerned it incurred an obligation in the amount of $100 in 1939, since it, as a practical matter, had to and did discharge the full amount of the real estate taxes assessed. Its obligation to pay, insofar as the taxable year 1939 was concerned, had become final and definite in amount when it paid the full amount of the real estate tax for 1939 assessed in that year. Viewing the situation at the end of that taxable year, as we must, we find that the plaintiff incurred and paid a $100 obligation, although it was under protest and with the bona fide expectation that a part of the payment would be subsequently refunded.

The plaintiff actually accrued on its books and deducted in its tax returns the full $100 amount. We think this was proper because the plaintiff incurred an expense in the amount of $100 in that year. Had the plaintiff failed to obtain a repayment of its real estate taxes for 1939, its returns would have correctly reflected its income for that year under the accrual method. There is no compelling reason why a sustained expense should be postponed until settlement of the question of repayment. Since the plaintiff was successful and obtained a repayment of $5, under our annual accounting concept this amount should be included as income in 1941, the year plaintiff's right to the repayment became final.

The underlying reason for the rule in the *Dixie Pine Products* and the *Security Flour Mill* cases of refusing a deduction where the taxpayer has not paid the expense and is contesting it, is because the expense may never be in-

curred. In the instant case the expense had been incurred and actually paid within the taxable year and is therefore deductible in that year.

What we have said does not mean that the mere payment of an item accrues that item, but rather we hold that payment of an item which is otherwise accruable in the taxable year accrues the item even though payment is made under protest and even though litigation is started within the taxable year to obtain repayment. Therefore, the plaintiff's prepayment in 1941 of part of its 1942 taxes does not accrue those taxes in 1941.

The plaintiff's argument based upon the fact that accepted accounting principles require that the disputed portion of the tax liability, although paid, should not be accrued until settlement of the dispute, lacks sufficient persuasiveness, under the facts presented in this case, because such principles represent a refinement in ascertaining net income that would be impractical and, in our opinion, infeasible in the administration of the revenue laws.

In view of the complex computations involved in these three cases, the parties have agreed upon computations of the amounts of income taxes overpaid or underpaid by the plaintiff dependent upon which of the alternatives the court finds to be correct. These computations are set forth in finding 47. We hold that finding 47 (C) sets forth the correct deductions and inclusions. Finding 47 (C) provides for the "allowanee as deductions in 1938, 1939 and 1941 of amounts of real estate taxes paid in those years ($100.00); and inclusion in 1941 income of the amounts of excess payments of real estate taxes for said years that were refunded in 1941 ($5.00)." Translated into dollar amounts in the individual cases, according to this finding, the plaintiff is entitled to recover $128,329.55 in case No. 49654; $105,305.58 in case No. 49655, and nothing in case No. 50432.

Judgment will be entered for plaintiff in case No. 49654 in the amount of $128,329.55, and in case No. 49655 in the

amount of $105,305.58, with interest thereon, respectively, as provided by law. The petition in case No. 50432 is dismissed.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner Richard H. Akers, makes the following findings of fact:

1. The plaintiff is a public utility corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office located at 4 Irving Place, Borough of Manhattan, City and County of New York, in the State of New York, and is engaged in the manufacture, distribution and sale of electrical energy and gas.

2. The plaintiff sues to recover income taxes alleged to have been overpaid for the calendar years 1938, 1939 and 1941. At all times during those years, the plaintiff kept its books and filed its income tax returns upon an accrual accounting basis.

3. Certain formal facts with respect to the years involved herein are as follows:

	1938	1939	1941
(a) Final return filed pursuant to extension duly granted, on or before	6-15-39	6-15-40	6-15-42
(b) Tax liability disclosed	$1,920,881.31	$3,603,304.48	$7,449,128.28
(c) Tax paid in almost equal quarterannual installments	$1,920,881.31	$3,603,304.48	$7,449,128.28
(d) Refund claims filed within statutory period	3-10-42	3-11-43	(1) 3-12-45 (1) 5-20-46 (2) 6-30-50 (3) 5- 4-51
(e) Amount of Refund Claims	$1,920,881.31	$3,603,304.48	(1) $7,449,128.28 (2) 3,095,708.31 (3) 3,269,564.00
(f) Amount of Refund (Deficiency) determined by Commissioner	$218,897.25	$166,387.86	($402,163.19)
(g) Refund (Deficiency) plus statutory interest received (Paid)	9-9-48	9-9-48	(8-17-50)
(h) Claim rejected to extent not theretofore allowed	9-16-48	9-16-48	(1) 8-8-50

4. The refund claims filed for the years 1938, 1939 and 1941 were based upon the alleged understatement of several deductions, among which were the deductions for depreciation and amortization. In a consideration of those claims, increased deductions for depreciation and amortization were allowed by the Commissioner of Internal Revenue for the years 1938, 1939 and 1941, but they were offset by other adjustments made by the Commissioner, chief of which were (1) the disallowance of that part of the real estate tax deductions taken in 1938 and 1939, which were refunded to the plaintiff in 1941, and (2) the inclusion of those refunded real estate taxes (including a refund of part of the real estate taxes paid in 1940) in the plaintiff's gross income for 1941. In addition thereto, the Commissioner disallowed the plaintiff's claim for an increase of $8,108,497.64 in its deduction for real estate taxes for 1941.

The allowances and the offsetting adjustments made by the Commissioner are shown in the following tabulation:

	1938	1939	1941
(a) Taxable income reported in return	$33,488,073.02	$33,823,720.99	$39,170,407.85
(b) Deduction taken in return for depreciation and amortization	14,312,327.34	14,505,413.97	15,732,734.73
(c) Deduction taken in return for New York City real estate of corporations taxes	12,087,225.01	12,026,877.80	11,479,281.08
(d) Taxable income, as reduced (increased) by Commissioner	36,908,009.95	37,209,023.10	(45,467,703.68)
(e) Decrease (increase) in taxable income as found by Commissioner (a) minus (d)	1,382,063.07	1,386,697.89	(1,297,300.81)
(f) Increased depreciation and amortization allowed by Commissioner	2,505,330.73	2,154,149.66	670,294.72
(g) Offsetting adjustments made by Commissioner			
—Reduced real estate tax deduction by	788,311.69	622,269.25	
—Included in gross income receipt of refund of real estate taxes paid in 1938, 1939 and 1940 aggregating			1,848,679.75

5. During the years involved herein, the plaintiff owned many hundreds of parcels of real estate in the City of New York which were subject to a real estate of corporations tax (hereinafter referred to as real estate tax) under the laws of the State of New York and of the City of New York in

general, and the New York State Tax Law, the New York City Charter and the Administrative Code of the City of New York in particular.

6. The New York City Charter, which became effective January 1, 1938, changed the operating year of the City of New York from a calendar year basis to a fiscal year basis of July 1 to the following June 30, commencing with July 1, 1939. Thereunder, each parcel of real estate, identified by section, block, lot and identification number, is appraised by the City Tax Commission as of January 25; the value so determined is placed upon a tentative assessment roll which is open for inspection from February 1 to March 15; an aggrieved property owner could then seek an administrative review to correct any claimed erroneous valuation by filing with the Tax Commission, on or before March 15, a sworn application for correction of the assessment setting forth the bases and grounds thereof, and could request an oral hearing thereon; a final determination must be made on or before May 25; and if no action is taken by then, the tentative assessment becomes final.

The assessment roll is then sent to the Comptroller of the City of New York who, between June 20 and June 25, prepares a proposed budget for the ensuing fiscal year and submits it, together with the assessment roll and his estimate of revenues to be raised from real estate taxes and from other sources, to the City Council. On the basis thereof, the Council must by June 25 adopt a budget and fix a real estate tax rate which, after considering revenues from other sources and when applied to the final valuation of the assessment roll, will produce the necessary revenue to meet the operating and budgetary requirements of the City for the ensuing year.

Bills for the real estate tax on each parcel—the product of the tax rate thus established and the valuations on the final assessment roll—are then sent to each property owner and are payable in two installments, October 1 and April 1 of the fiscal year.

7. An application for correction of assessment (sometimes called a protest), referred to in finding 6, must be filed on forms supplied by the Tax Commission and all pertinent questions thereon must be answered. Objections which can be raised are (1) overvaluation, (2) inequality, or (3) illegality. Overvaluation or inequality does not invalidate the tax or the liability therefor but merely calls for correction of the amount of the tax. Where illegality is predicated upon an illegal form or method of valuation, it is another way of raising the question of overvaluation or inequality; only where it is addressed to the validity of the tax itself does a successful challenge wipe out the tax in its entirety and all liability therefor.

8. One of the questions in the protest which must be answered is "What do you consider was the full value of the property on January 25 this year?" A similar question was in the protest forms for earlier calendar years. Failure to answer this question is, under New York law, fatal to such application. The Tax Commission causes each protest to be examined to ascertain whether this question is answered, and if it is not, the protest is summarily rejected. Without answering this question, it is impossible to obtain an administrative review of any real estate assessment in New York City.

9. Similar administrative procedures existed prior to the adoption of the New York City Charter, which became effective January 1, 1938, except that the dates set for the various administrative steps to be taken in the earlier years were moved back to fit in with the calendar year, so as to afford similar time intervals for the commencement and termination of the administrative steps. The City Charter retained the year 1938 on a calendar year basis and specific provisions were made for the transition period January 1, 1939 to June 30; for example, the valuations determined for the year 1938 constituted the valuations for this interim period subject to modification for additions and retirements, and the protests filed with re-

spect to the 1938 valuations were considered applicable to the same valuations for the interim period.

10. Under the New York law, an aggrieved property owner could not obtain a judicial review of a protested assessment without first exhausting the administrative procedure outlined. Upon failure to obtain satisfactory relief through administrative process, judicial review could then be instituted not later than October 25 (July 1 for 1938 and the first half of 1939) of the year in which the assessment becomes final.

Article 13 of the New York State Tax Law specifically provides for such judicial review (hereinafter referred to as certiorari proceeding). This is an exclusive remedy. Pursuant thereto, a verified petition to review the assessment must be submitted to an appropriate court or judge; an order thereon is issued directing the issuance of a writ of certiorari to the Tax Commission returnable on a specified date; and the issues raised upon the return date are thereafter brought to trial. In the case of properties as large as those owned by the plaintiff herein, it is virtually impossible to get a judicial determination of the issues raised within one and a half to two years after the cases are started.

11. The petition must explicitly and fully set forth the basis upon which the relief is sought: if it is overvaluation, the extent of the overvaluation must be alleged; if it is inequality, the instances of such inequality and the extent thereof must be alleged; and if it is illegality, the grounds of illegality must be specified. In all cases, except where illegality is addressed to the tax in its entirety rather than to its form or method, the petition must set forth, as did the original protest, what the full value of the property is claimed to be.

Under New York law, the petitioner is bound by the valuation thus alleged as the minimum value that could be found by the court. Thus, in complying with the require-

ment of the law of New York, and alleging both in the protest and in the petition to the court the claimed full value of the property involved, a taxpayer admits liability for real estate tax thereon in a certain and definite amount, namely, the claimed value of the property multiplied by the established tax rate.

12. The real estate tax rate for any particular operating year does not vary or change after it is established. The budget makes provision for estimated refunds of real estate taxes resulting from reductions in assessed valuations, and if the actual refunds exceed that estimate, the tax rate for the year involved is in no way affected thereby. To meet such additional expenditure, the City would have to borrow money therefor and then provide for payment of the loan in the budget of the following year or years, but the City Council does not reopen the budget of the year involved or change the tax rate already established for that year.

13. The institution or pendency of litigation for the correction of an assessment does not postpone the dates the bills for the real estate taxes become due and payable. Notwithstanding the pendency of such litigation, failure to pay the bills when due subjects the property involved to a tax lien which has the effect of a judgment lien and which could be foreclosed and the property sold. In addition, 7 percent per annum penalty interest is incurred.

There is no provision in the New York law for suspending or removing the tax lien, whether by injunction, bond or otherwise, other than by payment of the taxes thereon, as billed. Under the New York law an aggrieved property owner must first pay the real estate taxes thereon and then seek to rectify the error by the exclusive remedy outlined in the statute, or else run the risk, in addition to incurring a 7 percent interest penalty, of having the tax lien foreclosed and the property sold.

14. Immediately prior to the years involved herein, the Board of Taxes and Assessments (as the Tax Commission

was then known) had departed from the usual procedure of valuing each and every parcel of real estate and making individual assessments thereon by section, block, lot and identification numbers, and consolidated the assessments on the properties owned by the plaintiff into lump sum company assessments for the calendar years 1936 and 1937. These assessments were substantially in excess of the sum of the valuations theretofore assigned to the individual properties. The assessments were contested on the grounds of overvaluation and inequality and also illegality because of the lump sum company assessments.

15. For 1938 and subsequent years, the lump assessment procedure was discontinued and tentative assessments were made upon the individual parcels. The plaintiff sought administrative relief from, and review of, the valuation of its properties as they appeared on the tentative assessment rolls for the years involved herein by filing with the proper authorities timely protests and applications for correction of the assessments upon the forms supplied by the Tax Commission and in compliance with the laws and requirements of the City and State of New York. The valuations tentatively assessed, the valuations and overvaluations claimed in the protests, and the final valuations found by the Tax Commission, are as follows:

	1938	1939 [1]	1939/1940 [2]	1940/1941 [2]
(a) Valuation tentatively assessed	$411,106,175	$415,535,375	$407,254,850	$403,006,500
(b) Overvaluation claimed in protests	116,625,300	112,042,900	106,033,700	112,723,300
(c) Valuation claimed in protests (a) minus (b)	294,480,875	304,592,475	301,221,150	292,343,200
(d) Final valuation found by Tax Commission	410,985,375	416,635,375	407,040,350	402,707,900

[1] The City of New York interpreted the provisions of the City Charter with respect to this interim period (first half of 1939) as enabling it to reassess the parcels of real estate in their entirety and not merely the additions and retirements. Accordingly the Tax Commission fixed tentative supplemental valuations for 29 parcels of plaintiff's property in the aggregate amount of $234,850,450, of which $229,200,450, was on properties assessed in 1938 and $5,650,000, represented the net valuations of additions less retirements. Plaintiff filed timely and proper applications for correction of the supplemental assessments claiming illegality as well as overvaluations in the aggregate amount of $51,026,900. The Tax Commission fixed the final assessments in the aggregate amount of $234,850,450.

[2] Although plaintiff's income tax for taxable year 1940 is not involved herein (no refund claims or petitions have been filed for said year) the facts and figures with respect to the real estate taxes assessed and paid during that year are set forth because they affect plaintiff's income tax liability for the year 1941.

16. After they became final, the assessment rolls for these years were duly sent to the Comptroller of the City of New York who, in turn, duly transmitted them, together with his proposed budgets and estimates of receipts, to the City Council. Thereafter the budgets for the years involved were duly adopted and the tax rates for each of those years were duly established by the City Council. The operating budget, as adopted, and the relation thereto of the revenues to be raised through real estate taxes, for each of those years is as follows:

Fiscal year	Council meeting date	From		Total city operating budget	Percent of real estate taxes to total budget
		General funds	Real estate taxes		
1938 [1]	Mar. 1	$124,098,398.18	$465,882,180.45	$589,980,578.64	78.97
1939 [2]	Mar. 3	58,093,866.28	231,094,344.42	289,188,240.80	79.91
1939-40	June 20	118,500,000.00	469,009,679.45	587,509,802.45	79.83
1940-41	June 21	114,200,000.00	466,748,834.10	581,048,834.10	80.33
1941-42	June 24	119,746,327.61	453,994,366.52	573,740,694.13	79.13

[1] Calendar year.
[2] 6 months Jan. 1 to June 30.

17. The plaintiff duly paid the real estate taxes, as billed, for those years and accompanied those payments with letters of protest. All of those tax payments were made under conditions and reservations similar to those for the year 1938, the accompanying letter of which read in part as follows:

> Such payment as to each parcel so assessed is made involuntarily, and under protest and duress, and under compulsion of the penalties provided by law, and to avoid penalties, and to remove the lien of such taxes from the said properties of the undersigned Company. This payment as to each parcel so assessed is made without prejudice, and without admitting the validity of the purported assessments upon the said properties or of the taxes levied thereon, and without waiving any rights which the undersigned Company may have to contest the legality and validity of the said purported assessments, or the overvaluation or inequality in assessments re-

sulting from such purported assessments, or of the taxes levied thereon and imposed upon the said properties and upon the undersigned Company; and the undersigned Company hereby expressly reserves all rights to contest the said purported assessments as to each of such parcels and the said taxes levied thereon upon any and all of the grounds permitted by law.

18. Thereafter the plaintiff duly instituted proceedings for judicial relief and review by filing in the proper court timely petitions to review the final assessments, setting forth, as required by the New York law, the grounds for relief and the respective amounts claimed to be the full and fair value of each individual parcel of property. All of the petitions alleged overvaluation; most of them also alleged inequality and illegality. The allegations of illegality were all based upon illegal method and form except those with respect to the supplemental assessments for the first half of 1939 which were addressed to the entire supplemental assessments.

19. The final assessments of the Tax Commission, the extent to which they were claimed to be overvalued and the full values as alleged in the petitions are as follows:

	1938	1939	1939/1940	1940/1941
(a) Final assessed valuation	$410,983,375	$416,625,375	$407,040,300	$402,707,900
(b) Overvaluation claimed in petitions	[1] 116,536,000	112,042,500	[1] 105,859,700	[1] 119,378,100
(c) Valuations alleged in petitions (a) minus (b)	[1] 294,449,375	304,582,875	[1] 301,180,600	[1] 283,329,800

[1] These amounts are slightly lower than the amounts set forth in the protests (see finding 18) because of the slight reduction in values granted by the Tax Commission.

20. Under the law of New York, the plaintiff was bound by the valuations claimed in its petitions and thereby admitted liability for real estate taxes on the parcels of real estate involved to the extent of the product of the valuations thereon, as alleged, and the established tax rate for the years involved.

21. The protests and the certiorari proceedings with respect to the assessments for the calendar year 1938, the first half of the calendar year 1939, and the fiscal years 1939/1940 and 1940/1941, were bona fide and were filed, instituted, and prosecuted by the plaintiff in good faith.

The valuations therein claimed and asserted by the plaintiff with respect to each of the parcels were bona fide made in dollar amounts which represented the best business judgment of the responsible officers and management of the plaintiff as to the full value of the properties and the amounts that would ultimately be determined by the courts to be correct.

22. In addition to the knowledge and information of its own officers and employees with respect thereto, the plaintiff engaged in the latter part of 1937 outside, independent appraisal experts to make appraisals of all of its properties. While the appraisal job was in progress, the plaintiff's officers and employees had many conferences and were in constant contact with the appraisers, whose reports and working papers were at all times made available to them. The appraisal values, as finally determined by the experts, were generally somewhat lower than the values set forth and claimed by the plaintiff in the protests and in the certiorari proceedings.

23. The certiorari proceedings with respect to the lump sum assessments for the years 1936 and 1937 were settled in the year 1940 for a lump sum amount, thereby avoiding the extended effort and detail necessary to allocate to each individual parcel the amount and basis of that settlement. After those suits were out of the way and in the latter half of 1941, the plaintiff received from the City of New York a proposal which served as a basis for settlement of the then pending certiorari proceedings with respect to the real estate assessments for the years 1938 through 1941.

24. Up to the time that proposal was received, the plaintiff had definitely intended to prosecute the then pending certiorari proceedings to their ultimate conclusion. It was

confidently felt by the officers and management of the plaintiff that the valuations claimed and asserted in the protests and in the certiorari proceedings, supported by certificated opinions of its experts arrived at through application of accepted methods of appraisal, would ultimately be sustained by the courts.

25. The proposal, however, contained a development that was considered very important in that it afforded an opportunity to fix bases and determine methods of assessing the plaintiff's properties in future years in contrast with those employed in prior years that had resulted in expensive litigation. Another important consideration was the matter of public relations—the possible adverse effects of further extended controversy between the plaintiff, a public utility, and the City of New York, a part of the community it served. At that time municipal ownership of gas and electric plants was still a possibility.

26. On the other hand, acceptance of the proposal meant surrender by the plaintiff of part of its claim which it felt justly entitled to and firmly believed would be recovered. It thus became a question of alternatives between continuing litigation and recovering the overpayments of real estate taxes of the past years, or sacrificing a part thereof for the savings and benefits to be derived from an agreeable and harmonious working arrangement and relationship in the future.

27. The plaintiff finally decided that the future benefits warranted acceptance of the proposal and surrender of part of the past values to which it considered itself entitled. The justification of this decision was borne out by the harmonious relationship and valuation stability that existed thereafter until 1947.

28. Accordingly, a stipulation for settlement of the pending proceedings was entered into, which constituted a compromise of the amounts to be recovered by the plaintiff and the valuations to be placed upon each parcel of

real estate owned by the plaintiff. Based thereon the Corporation Counsel of the City of New York executed offers to allow final order, judgment or decree to be entered in said proceedings reducing the assessed valuations as agreed upon; orders thereon were entered with respect to each parcel; and stipulations of discontinuance dated August 29, 1941, were filed with the court. Pursuant thereto the City of New York made refunds to the plaintiff in 1941, aggregating $1,848,679.75, of real estate taxes paid for the years 1938, 1939 and 1940. The settlement also took into account and reduced the assessed valuations for the fiscal year 1941/1942, for which protests had already been filed.

29. The aggregate amounts of the values actually contested, the extent of the reduction, and the extent of the retention of the contested values resulting from the compromise and the stipulations and orders entered thereon, are as follows:

	1938	First half 1939	1939/1940	1940/1941
(a) Claimed overvaluation in the certiorari proceedings	$116,536,000	$112,042,900	$105,859,700	$119,378,100
(b) Amounts by which the contested values were reduced	25,695,000	25,795,000	16,590,000	14,655,000
(c) Amounts of the contested valuations that were retained	90,841,000	86,247,900	89,269,700	104,723,100

30. The amounts and the years in which the real estate taxes were paid and the deductions therefor taken in the plaintiff's income tax returns, are as follows:

Real estate taxes	Paid and deducted in—			
	1938	1939	1940	1941
First half 1938	$6,034,455.26			
Second half 1938	6,032,769.75			
First half 1939		$6,021,790.73		
First half 1939/1940		6,004,067.07		
Second half 1939/1940			$5,973,248.69	
First half 1940/1941			6,022,516.87	
Second half 1940/1941				$5,902,254.04
First half 1941/1942				5,677,127.89
	$12,067,225.01	$12,025,857.80	$11,995,765.56	$11,479,381.93

In 1941 the plaintiff paid an additional $5,626,518.25 real estate taxes, which represented the second half of the 1941-1942 real estate taxes, but no deduction for same was taken in its 1941 income tax return.

31. The valuations, as admitted in the plaintiff's protests and petitions for certiorari, as contested therein, and as finally stipulated and adopted by the court, in terms of the real estate taxes set forth in the preceding finding, are as follows:

	1938	1939	1940	Total
(a) Assessed real estate taxes paid and deducted in income tax returns	$12,087,225.01	$12,025,877.80	$11,996,065.56	$36,089,168.37
(b) Admitted liability	8,643,986.47	8,838,859.86	8,649,144.65	26,131,990.98
(c) Contested amount	3,423,238.54	3,187,017.94	3,346,920.91	9,957,177.39
(d) Tax liability determined under court orders	11,308,914.01	11,403,617.55	11,527,957.06	34,240,488.62
(e) Contested amount held valid under court orders (c) minus (f)	2,664,927.54	2,564,757.69	2,878,812.41	8,108,497.64
(f) Contested amount held invalid and refunded in 1941	758,311.00	622,260.25	468,108.50	1,848,679.75

32. The plaintiff was and is under the jurisdiction and supervision of the Public Service Commission of the State of New York (hereinafter referred to as P. S. C.) and kept its books and accounts in accordance with the "Uniform System of Accounts Prescribed for Gas Corporations" and the "Uniform System of Accounts Prescribed for Electric Corporations" established by orders of the P. S. C. dated June 16, 1937 and May 25, 1927, respectively, and in effect during the years involved herein. These Uniform Systems of Accounts constituted full and complete accrual systems of accounting.

33. Paragraph 228 in each of the Uniform Systems of Accounts dealing with Taxes Accrued provides as follows:

> A. This account shall be credited during each accounting period with the amount of taxes accrued during the period, corresponding debits being made to the appropriate accounts for tax charges. Such cred-

its may be based upon estimates, but from time to time during the year as the facts become known, the amount of the periodic credits shall be adjusted so as to include as nearly as can be determined in each year the taxes applicable thereto. Any amount representing a prepayment of taxes applicable to the period subsequent to the date of the balance sheet shall be shown under account 132, Prepayments.

B. The records supporting the entries to this account shall be so kept that the utility can furnish information as to the amount, by classes, of taxes accrued, the basis for each tax accrual and the accounts to which charged, and the amount, by classes, of taxes paid.

34. It was the plaintiff's practice to accrue monthly upon its books its real estate taxes over the period covered by those taxes. These monthly accruals were entered upon the books on the basis of assessments regardless of when or how the payment of those taxes was made. The payment of the taxes had no relation to, or effect upon, such accruals, which were entered both before and after the payment of the taxes. Such accrual of the real estate taxes conforms with the provisions and requirements of paragraph 228 of the Uniform System of Accounts (finding 33) and with the principles of accrual accounting.

35. The accrual method of accounting as recognized by well-established principles of accounting is fundamentally different from the cash basis of accounting. Under a strict cash basis, transactions and events are not recorded until cash has been received or paid, without regard to the period to which they relate or the period in which the revenues or expenses apply. The accrual method, however, is based upon the principle of recording transactions and events as they occur, regardless of when the cash receipts and disbursements part of the activities takes place. Revenues are accrued as nearly as practicable to the period earned, and expenses, which include taxes, are accrued and

allocated in as reasonable and consistent a manner as possible in the period and against the revenues they helped to produce. The primary purpose of accrual accounting principles is to obtain a proper and fair determination of periodic income, often referred to as the process of matching costs against revenues, so that in each accounting period there will be deducted all the ascertainable costs necessary to produce the revenue, including indirect period costs such as depreciation, taxes and interest.

36. Under the accrual method of accounting, the payment of cash extinguishes a liability that either has already been recorded for purposes of determining income or is yet to be recorded for purposes of determining income, but it does not of itself have any effect upon the determination of income. It may either precede or survive the accrual or recordation and is a balance sheet transaction which reduces the cash asset and is balanced by a corresponding reduction of a liability or the substitution of another asset in its place, but it has no effect on the profit or loss—the income determination.

37. When the term "accrual" is used in a balance sheet sense, as distinguished from an income-determining sense, it could never survive payment because payment extinguishes the liability and eliminates it from the balance sheet. But in an income-determining sense, payment has no effect upon accrual which may or may not survive payment depending upon whether the payment is in extinguishment of a liability already accrued or in prepayment of a liability to be incurred, determined, or accounted for at a later date or period.

38. Under accrual accounting, when payment is made with respect to a liability which is denied in whole or in part, the accounting principle as to charges against income would be the same as if payment had not been made; such payment would not affect the treatment of any accruals. This principle applies equally to the payment of

taxes. The payment of the admitted or estimated ultimate liability constitutes the payment of a current charge or expense of operations and the balance of that payment represents an amount estimated to be ultimately recovered and is chargeable to a suspense, deferred debit, or other receivable account. The latter item represents an asset—a deposit which is expected to be recovered.

39. These generally accepted principles of accrual system of accounting apply to the real estate taxes involved herein and are recognized in the Uniform Systems of Accounts prescribed by the P. S. C. (See findings 32 and 33.)

40. In recording the accruals of the real estate taxes on its books, the plaintiff did so solely on the basis of the assessments made and without regard to their payment, or the amounts that were contested, or the amounts which, in the considered judgment of the plaintiff's officers, would ultimately be eliminated. In all instances the accruals upon the plaintiff's books either preceded or survived the payment of the taxes.

41. The accrual on the plaintiff's books on the basis of the assessments without regard to their payment was in accord with the principles of accrual accounting and with the provisions of the Uniform Systems of Accounts promulgated by the P. S. C. However, the accrual on the basis of the assessments without regard to the amounts that were contested, or without taking into consideration the best judgment of management as to the plaintiff's ultimate liability therefor, was not in accord with the principles of accrual accounting or the provisions of the Uniform Systems of Accounts. In its income tax returns for the years 1938, 1939, 1940 and 1941, the plaintiff claimed deductions for the real estate tax items as they were accrued upon its books on the basis of these assessments.

42. The facts as above set forth may be simplified and illustrated by the following example which is applicable to all of the years involved herein:

(a) for the year 1939 plaintiff was notified on January 25, 1939, of a tentative assessment in the amount of	$100.00
(b) within the statutory period and by March 15, 1939, plaintiff, based upon the best judgment of its officers, duly filed a bona fide protest admitting liability of	85.00
and petitioning for an administrative reduction of said tentative assessment of $100 by	15.00
(c) after hearing duly held and on or about May 25, 1939 final assessment was made in the amount of	100.00
(d) thereafter on or about October 1, 1939 under protest and for the stated purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all rights, payment was made of	100.00
(e) within the statutory period, on October 25, 1939, certiorari proceedings were instituted admitting liability in the amount of, and denying liability in excess of	85.00
(f) on August 21, 1941, the Supreme Court of the State of New York entered its order in said certiorari proceedings fixing the tax liability at	95.00
(g) in October 1941 plaintiff received a refund of the excess payment of	5.00

43. The treatment of this simplified example as accrued on the plaintiff's books, as deducted on the plaintiff's returns, as finally allowed by the Commissioner of Internal Revenue and as contended for by the plaintiff, is illustrated as follows:

1939

Accrued on plaintiff's books	$100.00
Deducted on plaintiff's return	100.00
Deductions allowed by Commissioner	85.00
Deductions contended for by plaintiff	85.00

1941

Added to income by Commissioner	$ 5.00
Deductions contended for by plaintiff	10.00

An alternative contention advanced by the plaintiff is as follows:

(a) if $95 is to be allowed as a deduction in 1939, then the $5 does not constitute income in 1941; and

(b) if the $5 is to be included in the 1941 income, then the deduction for 1939 should be $100.

44. The proper book entries of this example, according to well-recognized and sound principles of accrual accounting, and in accordance with the Uniform Systems of Accounts prescribed by the P. S. C. are illustrated by the following set of entries:

1939

(1) Dr. Tax expense	$85.00	
Cr. Taxes accrued		$ 85.00
(To record the admitted liability for taxes for the year 1939)		
(2) Dr. Taxes accrued	85.00	
Deposit for contested taxes	15.00	
Cr. Cash		100 00
(To record payment of the assessed tax, part of which is contested)		

1941

(3) Dr. Cash	5.00	
Tax expense	10.00	
Cr. Deposit for contested taxes		15.00
(To record final settlement of the contested taxes:)		

45. Under the generally accepted and well-recognized principles of accrual accounting, the $15 in this example, which the plaintiff paid over and above its admitted liability of $85 for taxes in 1939, and which in the best judgment of management would be recovered as soon as full legal proceedings were consummated, would constitute an asset until August 1941 when the settlement was made, and when for the first time the plaintiff had knowledge that instead of an asset of $15 it had only an asset of $5, and that the remaining $10 was, instead, an expense.

46. Under these accrual accounting principles, the $10 expense is accrued and deducted in 1941 and is not related back to 1939 because accrual accounting principles are based, among other things, upon reasonableness and practicability. Under accrual accounting it would be considered unreasonable and impractical to go back and reopen closed years, the income of which had been determined upon an appraisal of all facts then known. Subsequent developments are taken into consideration and recorded in the year

when they occur. If they occur immediately after the end of the year involved and before the books for that year are closed (it usually takes about 30 days to close the books of a substantial business that are kept on an accrual basis), the same practical approach would prompt taking those events into account in the prior year—but aside from this exception, under accrual accounting principles, the facts and developments are recorded in the year they occur.

47. In view of the complex computations involved herein, the parties hereto, without attempting to limit or preclude a determination herein that would involve a computation upon any other basis, have made and agreed upon computations of the amounts of income taxes overpaid or underpaid by the plaintiff, in the event the Court disposes of the issues herein upon any of the following bases:

A. Allowance as deductions in 1938, 1939, 1940 and 1941 of the amounts of real estate taxes admitted in those years to have been due[1] ($85.00); allowance as deductions in 1941 upon termination of the litigation of the additional amounts of taxes determined to be due over and above the amounts previously admitted ($10.00); and exclusion from 1941 income of amounts of excess payments of real estate taxes in said prior years that were refunded in 1941 ($5.00);

B. Allowance as deductions in 1938, 1939, 1940 and 1941 of the amounts of real estate taxes ultimately determined to have been due for said years ($95.00); and exclusion from 1941 income of amounts of excess payments of real estate taxes for said years that were refunded in 1941 ($5.00);

C. Allowance as deductions in 1938, 1939 and 1941 of amounts of real estate taxes paid in those years ($100.00); and inclusion in 1941 income of the amounts of excess payments of real estate taxes for said years that were refunded in 1941 ($5.00).

---

[1] The figures in parentheses are the comparable figures in the simplified example referred to in finding 42.

Such computations disclose the following underpayments (overpayments) of principal amounts of income taxes made by the plaintiff for the aforesaid years:

	1939—Docket No. 49654	1939—Docket No. 49655	1940 [1]	1941—Docket No. 50432
A	[2] $450,987.74	[2] $434,602.51	$809,412.31	($3,095,708.31)
B			112,346.03	(573,090.72)
C	(128,329.55)	(105,305.58)		

[1] Not before the court herein—computation included to complete the record.
[2] Barred by the statute of limitations except to the extent it may be governed by sec. 3801 of the Internal Revenue Code.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, and it is therefore adjudged and ordered that it recover of and from the United States one hundred twenty eight thousand three hundred twenty nine dollars and fifty-five cents ($128,329.55) in case No. 49654; and one hundred five thousand three hundred five dollars and fifty-eight cents ($105,305.58) in case No. 49655, with interest on each amount as provided by law.

The plaintiff is not entitled to recover in case No. 50432 and its petition is therefore dismissed.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Rules involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Ackermann v. *United States*, 340 U.S. 193 8

Annat v. *Beard*, 277 F. 2d 544, certiorari denied 364 U.S. 908 8

Baldwin v. *Traveling Men's Assn.*, 283 U.S. 522 6

Berryhill v. *United States*, 199 F. 2d 217 8

Collins v. *City of Wichita*, 254 F. 2d 837 8

Commissioner v. *Sunnen*, 333 U.S. 591 9

Consolidated Edison Co. v. *United States*, 279 F. 2d 152, certiorari granted, 364 U.S. 898 5

Consolidated Edison Co. v. *United States*, 135 F. Supp. 881, certiorari denied, 351 U.S. 909, rehearing denied, 352 U.S. 1019, 364 U.S. 898 ..... 3, 4

Consolidated Edison Co. v. *United States*, 162 F. Supp. 854 4

Delzona Corp. v. *Sacks*, 265 F. 2d 157 10

Hoffman v. *Knox*, 50 Fed. 484 8

Lehman Co. v. *Appelton Toy & Furniture Co.*, 148 F. 2d 988 8

Polites v. *United States*, 364 U.S. 426 8

Safeway Stores v. *Coe*, 136 F. 2d 771 8

Scotten v. *Littlefield*, 235 U.S. 407 8

Simmons Co. v. *Grier Bros. Co.*, 258 U.S. 82 8

System Federation No. 91 v. *Wright*, 364 U.S. 642 8

Tilghman v. *Werk*, 39 Fed. 680 8

633735—62

Cases—Continued

	Page
Title v. United States, 263 F. 2d 28	8
United States v. *Consolidated Edison Co.*, 366 U.S. 380	5, 6
United States v. *Kunz*, 163 F. 2d 344	8

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 52	10, 11
Rule 60	7, 10
7 Moore, *Federal Practice* (2d ed.), par. 60.28	10
Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (June 1946)	7
Rules of the United States Court of Claims (rev. 1957):	
Rule 48	2, 9
Rule 54	2, 7, 9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 757

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. A, 19) is not officially reported.

JURISDICTION

The Court of Claims entered its order on December 6, 1961 (Pet. App. A, 19). The petition for a writ of certiorari was filed on February 28, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether a motion to vacate a prior judgment was properly denied by the Court of Claims, when

the motion was based on a change in the law occurring after the original judgment and the change of law occurred in another suit involving the same taxpayer.

2. Whether the Court of Claims must make findings of fact and enter conclusions of law in ruling on a motion to vacate a judgment under Court of Claims Rule 54(b), when the motion and the response to it raise no factual issues.

RULES INVOLVED

The pertinent portions of Rules 48 and 54 of the Rules of the United States Court of Claims (rev. 1957) are as follows:

> "RULE 48. FINDINGS BY THE COURT.
>
> In all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law and direct the entry of an appropriate judgment. The Court may adopt the Commissioner's report, including conclusions of fact and of law, or may modify it, or may reject it in whole or in part, or may direct the Commissioner to receive further evidence, or may refer the case back to him with instructions. Due regard shall be given to the opportunity of the trial Commissioner to judge of the credibility of the witnesses, and the findings of fact made by the Commissioner will be presumed to be correct.
>
> RULE 54. RELIEF FROM JUDGMENT OR ORDER.
>
> * * * * *
>
> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.:* On motion and upon such terms as are just,

the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

STATEMENT

Petitioner sought in this case to have the Court of Claims vacate its judgment of December 6, 1955, in *Consolidated Edison Co.* v. *United States*, 135 F. Supp. 881 (see Pet. App. E, 27–54). The Court

of Claims there held that Consolidated Edison, as an accrual-basis taxpayer, must deduct city and state property taxes in the years of payment (1938, 1939 and 1940), even though payment had been made under protest, and ultimate liability for the property taxes was not fixed until a subsequent year (1941). Thereafter, the taxpayer petitioned this Court for a writ of certiorari, which was denied on April 23, 1956. 351 U.S. 909. The taxpayer also filed an out-of-time petition for rehearing which was denied by this Court on February 25, 1957. 352 U.S. 1019. The judgment[1] of the Court of Claims became final and was satisfied.

A suit for the return of certain 1951 taxes was subsequently brought by the taxpayer in the District Court for the Southern District of New York, claiming that it was entitled to deduct in that year state and city property taxes that had been paid from 1946 through 1950 under protest. This suit for the later year involved the same legal issue presented in the prior suit in the Court of Claims. The district court decided the case in favor of the United States, agreeing with the Court of Claims on the legal principle involved. *Consolidated Edison Co.* v. *United States*, 162 F. Supp. 854. The Court of Appeals for the Second Circuit disagreed and held, reversing the district court, that deduction for the state and city property taxes should be taken in the year when

[1] The Court of Claims litigation involved three consolidated suits. For purposes of simplicity, references to the result of that litigation will be made as though only one judgment were involved.

the contest with state and city taxing authorities was concluded. *Consolidated Edison Co.* v. *United States*, 279 F. 2d 152.

In view of the conflict between the Court of Appeals for the Second Circuit and the Court of Claims, the United States petitioned this Court for a writ of certiorari, which was granted on November 14, 1960. 364 U.S. 890. Contemporaneously, the taxpayer, on September 20, 1960, filed in this Court a motion for leave to file a second petition for rehearing with respect to its petition for a writ of certiorari to the Court of Claims which had been denied on April 23, 1956. This motion was denied on November 14, 1960, the same day that certiorari was granted to review the Second Circuit's decision. 364 U.S. 898. After argument on the merits concerning the taxpayer's 1951 liability, this Court affirmed the Second Circuit's decision and concluded, contrary to the Court of Claims, that accrual of liability to the City and State of New York for property taxes must await the conclusion of all events that fixed liability. *United States* v. *Consolidated Edison Co.*, 366 U.S. 380.

Thereafter, on June 30, 1961, the taxpayer filed its petition and motion in the Court of Claims to vacate the judgment of that court which had become final following denial of certiorari on April 23, 1956. The United States filed its brief in opposition to the motion, and the motion was denied on December 6, 1961 (Pet. App. A, 19). It is from the denial of

this motion that the taxpayer now petitions for a writ of certiorari.

ARGUMENT

1. Respect for the finality of judgments has long been a basic principle in our system of jurisprudence. As this Court has stated (*Baldwin* v. *Traveling Men's Assn.*, 283 U.S. 522, 525–526):

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

The taxpayer, by motion, sought to vacate a judgment of the Court of Claims which had become final on April 23, 1956, when this Court denied its petition for writ of certiorari. It was thus attacking a final judgment that had been valid and subsisting for over five years.

The taxpayer claims, however, that the rule of law, upon which the Court of Claims had rested its decision, was subsequently overruled in another case by this Court,[2] and that therefore under Court of Claims

[2] It is, of course, undisputed that this Court's decision in *United States* v. *Consolidated Edison Co.*, 366 U.S. 380, did change the rule of law upon which the earlier Court of Claims' judgment was based.

Rule 54(b)(6), *supra*, it should be relieved from the earlier judgment. The taxpayer contends that, in denying this motion, the Court of Claims misconstrued and misapplied the scope of Rule 54(b)(6). The rule provides that:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (6) any other reason justifying relief from the operation of the judgment.

Rule 54(b) of the Court of Claims, which was adopted in 1951, is in all material respects identical with Rule 60(b) of the Federal Rules of Civil Procedure, as amended December 27, 1946, and was clearly patterned on the latter rule. The 1946 amendment which added Rule 60(b)(6) received the following commentary from the Advisory Committee on Rules for Civil Procedure:[3] "It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." Since no change in the substantive law as to the grounds for vacating judgments was intended by this amendment, we must look to prior case law in determining those grounds.

Consistent with the policy of respecting final judgments, it has been always held that a subsequent change in the authoritative rule of law is not sufficient

[3] See Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (June 1946), p. 84.

grounds to vacate a final judgment entered on a decision before the change. This rule has been uniformly applied in this Court and the lower federal courts, both before and subsequent to the promulgation of the Federal Rules of Civil Procedure. *Scotten* v. *Littlefield*, 235 U.S. 407; *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82; *Collins* v. *City of Wichita*, 254 F. 2d 837 (C.A. 10); *Berryhill* v. *United States*, 199 F. 2d 217 (C.A. 6); *United States* v. *Kunz*, 163 F. 2d 344 (C.A. 2); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F. 2d 988 (C.A. 7); *Safeway Stores* v. *Coe*, 136 F. 2d 771 (C.A. D.C.); *Hoffman* v. *Knox*, 50 Fed. 484 (C.A. 4); *Tilghman* v. *Werk*, 39 Fed. 680 (S.D. Ohio); cf. *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 534 (C.A. 5), certiorari denied, 364 U.S. 908; *Title* v. *United States*, 263 F. 2d 28 (C.A. 9). The taxpayer has cited no case in conflict with this principle.[4]

The taxpayer seems to recognize that a subsequent change in the law is ordinarily not grounds for vacating a judgment (Pet. 15), but argues that this rule should not apply where the change in law occurs in a subsequent suit by the same taxpayer particularly if the two suits constituted a single

[4] The taxpayer implies (Pet. 13) that this Court's decisions in *Polites* v. *United States*, 364 U.S. 426, and *System Federation No. 91* v. *Wright*, 364 U.S. 642, recognize that a subsequent change in law may be grounds to vacate a judgment. However, in *Polites*, the Court specifically declined to decide the point (364 U.S. at 433), and in *System Federation*, the decision was rested on the inherent power of a court of equity to modify the prospective effect of an injunctive decree in the light of changed circumstances.

controversy. The taxpayer contends (Pet. 7) that both the original suit in the Court of Claims and the subsequent suit in the district court, which subsequently was reviewed by this Court, were parts of one controversy. It is clear, however, that tax liability for each taxable year is separate and distinct. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 598. Here the taxpayer voluntarily chose to litigate in two different courts, and, although involving common questions of law, the two suits were separate and distinct legal controversies. If one were to accept taxpayer's construction of this as a single controversy, it would follow that the second suit should have been dismissed as *res judicata* (or for splitting the cause of action). Now that that hurdle has been passed, the taxpayer cannot ignore the separate identity of the suit which permitted him to relitigate the common question of law.

2. In disposing of the taxpayer's motion to vacate the prior judgment, the Court of Claims made no findings of fact or conclusions of law, and rendered no opinion. The motion was simply disposed of by an order of denial (Pet. App. A, 19). The taxpayer now asserts that the court's action was such a departure from its procedural rules (Rule 48) as to call for the exercise of this Court's supervisory power over the lower federal courts (Pet. 10–11).

Under Court of Claims Rule 54(b), *supra*, pp. 2–3, a proceeding to vacate a final judgment of that court may take the form either of a motion or an independent action. Petitioner chose to proceed by motion. Court of Claims Rule 48, *supra*, p. 2,

provides: "In all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law * * *." This rule clearly does not govern the disposition of motions to vacate judgments. Such a motion is not an action, but rather is an ancillary proceeding. Although some lower courts have, in their discretion, filed opinions in disposing of motions to vacate final judgments (see Pet. 10–11, note 29), petitioner cites no case holding that a trial court must do so. The only case discovered holds clearly to the contrary. In *Delzona Corp. v. Sacks*, 265 F. 2d 157, 159, the Third Circuit held that Rule 52(a) of the Federal Rules of Civil Procedure—which provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion * * *"—did not require findings of fact and conclusions of law for decisions on motions to vacate a judgment under Federal Rule 60(b). Accord, 7 Moore, *Federal Practice* (2d ed.), par. 60.28, p. 330.

In addition, even if the taxpayer had brought an independent action, the clear language of Rule 48 states that the Court of Claims is required to make findings of fact and enter conclusions of law only in "actions tried on the facts." Here, as the taxpayer admits (Pet. 8–9), the facts relied on in support of the motion were uncontroverted. Therefore, no issue was raised other than the legal sufficiency of the motion as a basis for relief from a final judgment. If the facts, as alleged, do not state legal grounds for relief, there can be no purpose served in deter-

mining the uncontroverted truth of these legally inadequate allegations.

It is also contended (Pet. 17–18) that the failure of the Court of Claims to render an opinion in denying the motion resulted in a deprivation of property without due process. Petitioner's argument, if correct, would require an opinion in ruling on any motion that raised a point of law. The fallacy of this argument is apparent from the express provisions of Rule 52(a) of the Federal Rules of Civil Procedure, *supra*, p. 10. Moreover, a motion to vacate a judgment in the Court of Claims on a question of law is largely equivalent to a delayed motion for rehearing. It would be a burdensome rule, indeed, which required a court to render an opinion with findings every time it denied a motion for rehearing. It cannot seriously be contended that due process requires such a rule.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOHN B. JONES, JR.,
ROBERT L. WATERS,
Attorneys.

MARCH 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962

LIBRARY
SUPREME COURT, U. S.

No. 757

Office-Supreme Court, U.S.
FILED
APR 3 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

JAMES K. POLK
Counsel for Petitioner
522 Fifth Avenue
New York 36, N. Y.

Of Counsel:
RICHARD JOYCE SMITH
JULIUS M. JACOBS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 757

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

The Government's brief in opposition shows all the more why the petition for a writ of certiorari should be granted.

I

The government's opposition to the petition on the procedural question (G 9-11)[1] is based upon the last sentence in Federal Rule 52(a). Appendix II, p. 12 infra. But

[1] References to the Government's brief are indicated by the letter G and page number.

that sentence is omitted from Court of Claims Rule 48, Appendix I, p. 9, infra. We submit that the omission was not through oversight.

The fact that it was deemed necessary to add this sentence to 52(a) contradicts the government's assertion (G 10) that the phrase "in all actions tried on the facts" is addressed only to actions and does not apply to motions.

The government's partial quotation of this sentence makes it necessary, in order to counteract possible adverse inferences, to briefly touch upon matters which ordinarily are reserved for a brief on the merits.

The first sentence of Federal Rule 52(a), like that of Court of Claims Rule 48, lays down the general rule requiring findings of fact and conclusions of law "in all actions tried upon the facts". The last sentence of 52(a) creates an exception to this general rule—that motions under Rules 12 or 56 do not require such findings. Such exception is understandable because (1) a motion under 56—summary judgment—involves only a question of law, and (2) a motion under 12, Appendix II, p. 11, infra, is addressed to the formalities of pleading or jurisdiction and does not involve a final determination of the facts and merits of the case which would preclude a litigant from further pursuing his asserted rights. That this is the overall design of 52(a) is clearly evidenced by the exception to the exception which the Government omitted from its quotation—"except as provided in Rule 41(b)". Appendix II, p. 11, infra.[18] Nor does the phrase "any other motion" in this last sentence support the implication that the exception to the general rule covers

[18] Similarly, the Government (G 10-11) purporting to answer Petitioner's argument at top of p. 9 of its main brief with respect to Court of Claims Rule 49(c), the counterpart of Federal Rule 41(b), omits any discussion thereon.

all motions, including a motion under 60(b)(6). If that were so, then the specific reference to motions under Rules 12 or 56 would be superfluous. Under the doctrine of *eiusdem generis*, "any other motion" is limited to any other motion like that of Rule 12 or 56, i.e., a motion which involves only a question of law or is not addressed to the facts and merits of the case. This also explains the omission of that last sentence from Court of Claims Rule 48: because motions for summary judgment are fully covered in Court of Claims Rule 51; motions under Federal Rule 12 generally do not apply in Court of Claims suits except a motion for judgment on the pleadings which is covered in Court of Claims Rule 16(c), Appendix I, p. 9, infra; and the applicable provisions of Federal Rule 41(b) are specifically covered in Court of Claims Rule 49(c), Appendix I, p. 9, infra.

Since Court of Claims Rule 48 contains no last sentence exception to the general rule laid down in the first sentence, the Government's claim that 48 does not apply to a motion under 54(b)(6) is contradicted by its own reasoning. Indeed, it is also contradicted by Professor Moore who maintains that the last sentence of 52(a) should be read in conjunction with, and is limited by, the first sentence of that rule. See 5 *Moore*, Federal Practice (2d ed.), par. 52.08, pp. 2670-2674, particularly pp. 2673-2674. The contrary dictum in the *Delzona* case[2] is just an additional reason for the exercise of the supervisory powers of this Court in order to obtain uniformity in the practice and procedure of *all* of the United States Courts.

II

In opposing the petition on the question of clarification of the criteria and guide-lines for the application of 60(b)(6), the Government completely ignores the facts which

[2] *Delzona Corporation* v. *Sacks*, 265 F. 2d 157. A careful reading of the case discloses that the motion, labelled as a motion under 60(b), was really a motion for a new trial of matter already previously decided. Such a motion is not "tried on the facts" and requires no findings.

served as the basis for the motion in the court below[3] and fails to meet the issue presented, namely, whether *all* of those facts, taken together, constitute that "extraordinary" set of facts and circumstances which this Court held, in *Klapprott*,[4] warranted relief under (b)(6). Instead, the Government avoids the applicability of *Klapprott* by referring to the comment of the Advisory Committee that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, and it seizes upon only the last of the facts relied on by petitioner—the decision of this Court in the New York case[5]—to argue that a subsequent change in law is not a basis for vacating a final judgment entered before the change (G 7-8). It then concludes with the statement that "[t]he taxpayer has cited no case in conflict with this principle"[6] (G 8) thus proving that petitioner, by making the motion under subdivision (b)(6) was "attacking a final judgment that had been valid and subsisting for over five years" and that petitioner was showing its "[dis]respect for the finality of judgments [which] has long been a basic principle in our system of jurisprudence" (G 6).

Of course 60(b), or Court of Claims Rule 54(b), does not purport to define the substantive law as to what constitutes (1) mistake, etc., (2) newly discovered evidence, or any of the remaining four categories set forth in the Rule. But this Court *did* define the substantive law— the stand-

---

[3] They are neither recited in the Government's statement of facts nor are they referred to in the Government's argument.

[4] *Klapprott* v. *United States*, 335 U. S. 601.

[5] As in the main brief, the "New York case" refers to the suit instituted in the New York District Court which ultimately reached this Court where it was held that the original decision and judgment of the court below was erroneous. *United States* v. *Consolidated Edison Co.*, 366 U. S. 380.

[6] The simple answer to this statement is that the petitioner has never maintained that the mere subsequent change of a rule of law is ground for vacating an erroneous judgment under Rule 60(b)(6); nor is that the basis for the petition herein.

ards, guide-lines and criteria—as to what constitutes "any other reason justifying relief from the operation of the judgment" under (b)(6). (12-16)[7] Yet the Government does not even mention *Klapprott* which is the cornerstone of that substantive law.

Nor does the Government's assertion and constant repetition that the judgment below is final, meet the issue. The Government overlooks the inherent power of our courts, absent statutory enactments to the contrary, to control and correct their own judgments whenever equity and justice require such correction;[8] and it erroneously assumes that a judgment attains the status of absolute finality independently of any court rule or of any established rule of practice and procedure.[9] Moreover, it completely ignores the fact that 60(b)(6) specifically provides for relief from a "final judgment"—one which up to the time a motion is made thereunder has already attained that finality of which the Government speaks.

The Government's misconception of the issue presented by the petition herein is underscored by its argument (G 9) that somehow the fact that petitioner had successfully invoked the principle enunciated in *Commissioner* v. *Sunnen*, 333 U. S. 591, that the judgment of the court below was not *res judicata* of the New York suit, precludes the peti-

[7] References to petitioner's main brief are in parenthesis.

[8] Compare *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U. S. 183 and *Boudoin* v. *Lykes Bros. Steamship Co.*, 350 U. S. 811 where corrective relief was granted long after the judgment had obtained the finality the Government refers to. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. * * * Orderly rules of procedure do not require sacrifice of fundamental justice." *Hormel* v. *Helvering*, 312 U. S. 552, 557.

[9] Had Court of Claims Rule 53(e) provided that a motion for a new trial, etc., could be made within six years, instead of 30 days, after entry of judgment, the Government would have to admit that the judgment below could not have attained finality until expiration of the six years.

tioner from maintaining in the present proceeding that in substance, though not in form, the New York case was but a continuation of the single controversy which the court below had erroneously decided in the first instance.

In advancing this argument the Government misreads the *Klapprott* and *Sunnen* decisions and the equitable principles they enunciate. *Klapprott* held that the confining technicalities of common law remedies will not prevent the grant of relief under (b)(6) whenever such action is appropriate to *accomplish justice.* And *Sunnen* held that the common law technicalities of the separability of causes of action will be strictly observed in order to *accomplish justice*. The two cases complement each other and are not in conflict, as the Government implies. In both there is a consistent and purposeful goal of accomplishing justice. Disregard, or recognition, of the common law technicalities is merely the means to that goal. The Government, however, suggests that such technicalities be used in the present case as ends in themselves; that having successfully invoked the equitable principles of *Sunnen* in the New York case and thereby avoided the injustice of perpetuating error through the doctrine of *res judicata*, the petitioner has now, in the context of relief under (b)(6), forfeited the right to invoke the equitable principles of *Klapprott*. It is because of this misconception that nowhere in the Government's brief is any consideration given as to whether, in the light of all the facts and circumstances in this case, it is fair, equitable or just to permit the admittedly erroneous judgment of the court below to remain and to permit the Government to retain the monies it had erroneously collected.

Conclusion

In view of all of the foregoing it is submitted that the Government not only has failed to advance a valid reason why certiorari should not be granted, but also has shown,

by its arguments, the need for the exercise of this Court's power of supervision to obtain uniformity in the practice and procedure of the Court of Claims and of the District Courts, and the need for further clarification by this Court of the guide-lines and criteria in the application of Federal Rule 60(b)(6).

Respectfully submitted,

James K. Polk,
Counsel for Petitioner.
522 Fifth Avenue,
New York 36, N.Y.

Of Counsel:

Richard Joyce Smith,
Julius M. Jacobs.

APPENDIX I

Rules of the United States Court of Claims

RULE 16. DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED

* * *

(c) Motion for Judgment on the Pleadings: After the pleadings are closed but within such time as not to delay the taking of evidence, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 51, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 51.

RULE 48. FINDINGS BY THE COURT

In all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law and direct the entry of an appropriate judgment. The Court may adopt the Commissioner's report, including conclusions of fact and of law, or may modify it, or may reject it in whole or in part, or may direct the Commissioner to receive further evidence, or may refer the case back to him with instructions. Due regard shall be given to the opportunity of the trial Commissioner to judge of the credibility of the witnesses, and the findings of fact made by the Commissioner will be presumed to be correct.

RULE 49. DISMISSAL OF ACTIONS

* * *

(c) Insufficiency of Evidence: (1) Promptly after the plaintiff has completed the presentation of his evidence, the defendant may by motion to the Commissioner ask for a dismissal of the action by the Court on the ground that upon the facts and the law the plaintiff has not shown a right to recover: * * * (3) if, upon a consideration of the motion

and the opposition thereto, the Commissioner is convinced that the motion should be granted by the Court, he shall so state in his ruling on the motion * * * the Commissioner shall make and file his findings of fact material to the issues raised by the motion and his recommendation for conclusions of law thereon. * * * Thereafter, all proceedings shall be the same as in a case where a Commissioner's report is filed upon the entire evidence produced by both parties. * * *

RULE 53., REHEARING; AMENDMENT OF JUDGMENTS: NEW TRIALS

* * *

(c) Time for Motion: * * * a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial shall be filed not later than 30 days after the entry of the judgment.

APPENDIX II

Federal Rules of Civil Procedure

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party, * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 41. DISMISSAL OF ACTIONS

* * * *

(b) Involuntary Dismissal: Effect Thereof. * * * After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evi-

dence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion of memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *